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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1869.

REPORTED BY

ALFRED HELM, CLERK OF SUPREME COURT,

AND

THEODORE H. HITTELL, Esq.

VOLUME V.

SAN FRANCISCO:

BACON & COMPANY, BOOK AND JOB PRINTERS, EXCELSIOR OFFICE,

536 Clay Street, just below Montgomery.

1870.

Rec. Dec. 30, 1894.

PREFACE.

It will be observed that there is much confusion of the Judicial Districts, as now numbered and called — there being two Eighth Districts, and no Tenth. This was probably owing to changes made and new districts formed near the close of the last session of the Legislature, but was fully corrected in the Act of March 5th, 1869, re-districting the State. Under that Act, which takes effect on the first Monday of January, A.D. 1871, there will be nine Judicial Districts.

JUSTICES OF THE SUPREME COURT.

HON. J. F. LEWIS,.....CHIEF JUSTICE.
HON. J. NEELY JOHNSON,.... }
HON. B. C. WHITMAN,..... }ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

ROBERT M. CLARKE,.....ATTORNEY GENERAL.
ALFRED HELM,CLERK.

DISTRICT JUDGES OF THE STATE OF NEVADA.

First District,.....HON. RICHARD RISING.
Second District,.....HON. S. H. WRIGHT.
Third District,.....HON. C. N. HARRIS.
Fourth District,.....HON. WM. HAYDON.
Fifth District,.....HON. G. G. BERRY.
Sixth District,.....HON. JOHN H. BOALT.
Seventh District,.....HON. BENJ. CURLER.
Eighth District, Esmeralda County,..HON. J. G. McCLINTON.
Eighth District, White Pine County,..HON. WM. H. BEATTY.
Ninth District,.....,....HON. CHARLES A. LAKE.
Eleventh District,.....HON. GEORGE D. KEENEY.

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R U L E S
OF
THE SUPREME COURT
OF
THE STATE OF NEVADA.

RULE I.

Applicants for license to practice as Attorneys and Counsellors will be examined in open Court on the first day of the term.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) twenty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored, the dismissal shall be final and a bar to any other appeal from the same order or judgment.

RULE IV.

On such motion, there shall be presented the certificate of the Clerk below, under the seal of the Court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of the filing the undertaking on appeal, and that the same is in due form, the fact and time of the settlement of the statement, if there be one; and, also, that the appellant has received a duly certified transcript, or that he has not requested the Clerk to certify to a correct transcript of the record; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this Court shall be on paper of uniform size, according to a sample to be furnished by the Clerk of the Court, with a blank margin one and a half inches wide at the top, bottom, and side of each page, and the pleadings, proceedings, and statements shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding, and of the testimony of each witness, and shall have, at least, one blank or fly-sheet cover.

Marginal notes of each separate paper, order, or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the Clerk of the Court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the Court below, either party may suggest the same, in writing, to this Court, and upon good cause shown, obtain an order that the proper Clerk certify to the whole or in part of the record, as may be required. If the Attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the Court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the Court on the part of such representative or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties: *provided*, that all cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes from the same judicial district shall be placed together, and all the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that causes in which the people of the State are a party, shall be placed at the head of the calendar.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the Clerk a copy of his own for each of the Justices of the Court, or may, one day before the argument, file the same with the Clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the Court; but each defendant who has appeared separately in the Court below, may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the Court, after having been finally corrected, shall be recorded by the Clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the Court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the Court below shall be issued until the expiration of the ten days herein provided, and decision upon the petition, unless upon good cause shown, and upon notice to the other party, or by written consent of the parties, filed with the Clerk.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the Court below.

RULE XVII.

No paper shall be taken from the court-room or Clerk's office, except by order of the Court, or of one of the Justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the Clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the Court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the Clerk of the Court below, and upon giving notice thereof to the opposite party or his Attorney, and to the Sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this Court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree, which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. Where the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
JANUARY TERM, 1869.

THE STATE OF NEVADA EX REL. AUGUSTUS ASH, v.
WM. K. PARKINSON.

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LEGISLATIVE FUND ACT CONSTITUTIONAL. The Act of 1869, to create a legislative fund (Stats. 1869, 54) is not unconstitutional.

PRESUMPTION OF CONSTITUTIONALITY OF STATUTES. The presumptions are always in favor of the rightful exercise of the law-making power, and a statute will be sustained if there be any reasonable doubt of its unconstitutionality.

CONSTITUTIONAL CLAUSE AS TO GENERAL AND UNIFORM LAWS. The Legislative Fund Act of 1869 (Stats. 1869, 54) does not violate the constitutional clause providing for general and uniform laws where they can be made applicable, (Const., Art. IV, Sec. 21) because no general law could be made applicable to its subject matter.

CONSTITUTIONAL CLAUSE AS TO PUBLIC DEBT OF STATE. The Legislative Fund Act of 1869, was not in violation of the constitutional provision against contracting a public debt exceeding three hundred thousand dollars, (Const., Art. IX, Sec. 3) though then there was a public debt to that amount, for the reason that the Act did not create a debt within the meaning of the Constitution.

ADMISSIONS OF COUNSEL IN ARGUMENT. Upon a grave question involving the public interest the mere admission of counsel will not relieve the Court from its consideration.

CONSTITUTIONAL LANGUAGE—PREVIOUS CONSTRUCTION BY OTHER STATES. Where language is employed in the Constitution similar to the language in the Con-

Ash v. Parkinson.

stitution of other States, which had previously received judicial interpretation, the legal presumption arises that the language is used with reference to such interpretation.

APPROPRIATION IN ANTICIPATION OF RECEIPT OF PUBLIC REVENUE. The public revenues may be appropriated by the Legislature in anticipation of their receipt, as is done in the Legislative Fund Act of 1869, (Stats. 1869, 54) and it is not necessary to the validity of such an appropriation that funds to meet it should be in the treasury.

EXPENDITURE NECESSARY TO CARRY ON LEGISLATIVE ACTION. As the Constitution provides for a Legislature and recognizes incidentally the necessary officers and ordinary adjuncts of such a body, it also impliedly authorizes such expenditures as are necessary to carry it on.

INTEREST ON CONTROLLERS' WARRANTS. If, as is now decided, warrants issued under the Legislative Fund Act of 1869, create no debt against the State within the meaning of the constitutional restriction, (Const., Art. IX, Sec. 3) the addition of an interest clause to such warrants cannot make them unconstitutional.

INTEREST, WHAT. Interest constitutes no part of the original demand; it is simply a statutory allowance for delay.

POLICY AND EXPEDIENCY OF STATUTES. With the question of the policy or expediency of a statute the judicial department has nothing to do; in that regard the Legislature is supreme.

ABUSE OF POWER NO ARGUMENT AGAINST ITS EXISTENCE. That a power may be abused is no argument against either its existence or its exercise.

INTEREST ON "FIXED COMPENSATION" OF LEGISLATORS. The Legislative Fund Act of 1869, (Stats. 1869, 54) in so far as it provides for interest on warrants drawn for the pay of Legislators, is not repugnant to the constitutional provision regarding a fixed compensation to members of the Legislature, (Const., Art. IX, Sec. 33) for the reason that the interest, if any accrues, is to be paid not as compensation for services but as damages for delay.

CONSTITUTIONAL CLAUSE AS TO BOARD OF EXAMINERS—PAY OF LEGISLATORS. The Legislative Fund Act of 1869 is not repugnant to the constitutional provision as to the Board of Examiners, (Const., Art. V, Sec. 21) nor do the claims therein provided for require action by such Boards.

FUNCTIONS OF BOARD OF EXAMINERS. The institution of the Board of Examiners was not intended as a check on legislative extravagance, but to secure, as a pre-requisite to legislative action, an examination of such claims as require such action upon them as claims—not creative action but adoptive or rejective action.

CONSTITUTIONAL "CLAIM AGAINST THE STATE." A "claim against the State," within the meaning of the Constitution, (Art. V, Sec. 21) is a demand by some one other than the State against it for money or property; but when a claim originates with the State or in its behalf, and contemporaneously with its origin, means, and manner of payment are provided as in case of a bond, it does not then constitute a claim proper against the State but a liquidated and legalized demand against the treasury.

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LEGISLATIVE POWER TO APPROPRIATE MONEY. The Legislature has power to appropriate money as it sees fit except when limited by the Constitution.

INCIDENTAL EXPENSES OF LEGISLATURE TO ACCRUE. Incidental expenses of the Legislature to accrue cannot be held to constitute "claims against the State," nor do they require action by the Board of Examiners as such.

CONSTITUTIONAL INTERPRETATION—COTEMPORANEOUS LEGISLATION. In constitutional interpretation cotemporaneous legislation is always considered of force.

COTEMPORANEOUS LEGISLATION AS TO LEGISLATIVE EXPENSES. The constitutional provision relating to the Board of Examiners (Const., Art. V, Sec. 21) has been treated by cotemporaneous legislation as inapplicable to legislative expenses.

INCIDENTAL EXPENSES OF LEGISLATURE ALREADY ACCRUED. There is a reasonable doubt as to whether the incidental expenses of the Legislature already accrued, constitutionally require examination by the Board of Examiners; and on the question of the constitutionality of a statute providing for the payment of such expenses without such examination, it cannot on the ground of not providing for such examination be pronounced unconstitutional.

THIS was an original proceeding in the Supreme Court, for a writ of mandamus upon William K. Parkinson, the Controller of State. The facts are stated in the opinion.

C. J. Hillyer, S. Bonifield, P. W. Welty, and C. E. DeLong,
for Petitioner.

I. If there is any ambiguity in the constitutional provisions, the law must be upheld. (Sedgw. on Const. Law, 482; 17 Cal. 551.)

II. The principal and interest are both payable directly out of the treasury by appropriation made, and therefore no constitutional debt is incurred. The demand is not excepted from the debt clause by reason of the money being supposed to be in the treasury; but by reason of the manifest intention of the Legislature that it shall be met by current revenue. (*State v. Medbury*, 7 Ohio State Reports, 526; 27 Cal. 175.)

III. Interest is not payment for services, but compensation for delay of payment. The warrants by the Act are payable on demand; and if there is money in the treasury, no interest will be paid.

IV. Cotemporaneous legislative construction sustains the law. Three successive Legislatures have passed laws—and the Governor approved them—possessing the same objectionable features as the present law. (Sedgw. on Const. Law, 487; Stats. 1864–5, 129; Stats. 1866; Stats. 1867.)

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V. The Act does not "pass upon or purpose to pass upon" any kind of claim or demand. The drawing of the warrant could not impede the action of the Examining Board, even if the examining clause of the Act was inoperative by reason of its unconstitutionality.

VI. The incidental expenses of the Legislature are not claims within the meaning of the Constitution. The phrase "claims against the State" is used twice in the same section; it is reasonable to say, that it has the same meaning in each place. In the latter clause, it certainly means that class of claims which require to be "passed upon" by the Legislature; it must be held to mean nothing more than this in the first clause.

The idea of the Board of Examiners being constitutionally a sort of Court of Claims is visionary. No such power was ever given in such vague language. The power given is simply to examine, not to adjudicate. The whole machinery of its action is under the control of the Legislature, the body called its appellate tribunal. In fact, it is a Committee, not a Court, because its action must be followed by legislative action. Wherever therefore there is no need of legislative action, there is no constitutional opportunity of action by the Board.

VII. The most that can be said in regard to the constitutional provision for an Examining Committee is that it prescribes a constitutional pre-requisite to the validity of a particular class of laws. It is therefore a form, like many others, designed to guard against the improper passage of a particular class of laws; and this form is not at all of the essence of the law. Nothing in the law, or in any constitutional record, certificate, or journal, show whether this form has been complied with or not. And it is not matter *in pais* which can be inquired into by other evidence. (3 Ohio, 482; 23 Wend. 169; 4 Hill, 394.)

R. M. Clarke, Attorney-General, and *R. S. Mesick*, for Respondent.

I. The Act of 1869 is special in a case where a general law can be made applicable, and is therefore in violation of the Constitution, article four, section twenty-one. It provides interest-bearing warrants for a part only of the general indebtedness of the

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State. It also provides a particular method of redemption for a part only of the general indebtedness of the State. It is further special in exempting a part of the general indebtedness of the State from the examining, auditing, and disbursing powers of the State. A general law could be made applicable.

II. The Act violates section three, article nine, of the Constitution, limiting the indebtedness of the State to three hundred thousand dollars, for the reasons that the indebtedness of the State already equals the constitutional limits; that there is now no money in the general fund; and that the warrants authorized create a present and absolute, and not a future and contingent debt.

III. The issuance of interest-bearing warrants upon the treasury, and especially the issuance of interest-bearing warrants in anticipation of indebtedness, convertible into money by negotiation, is in violation of the manifest spirit of the Constitution, and the financial theory of the State. (Const., Art. IV, Secs. 19, 28, and 33; Art. IX, Sec. 3; Art. XVII, Sec. 24; Const. Debates, 757, *et seq.*)

It was the unquestionable theory of the framers of the fundamental law to require the affairs of the State to be conducted on a cash basis, and limit the public debt to three hundred thousand dollars; to induce and compel economy, and to limit taxation and prevent the payment of interest.

The measure in suit, in principle and effect, defeats these wise intentions, destroys every safeguard, and breaks down every barrier to extravagance.

IV. If one class of warrants may be made interest-bearing, all may be. If fifteen per cent. interest may be allowed, one hundred or any rate may be. If warrants for five thousand dollars may be drawn in anticipation, both of revenue and indebtedness, and put upon the market and sold, then warrants for nine hundred thousand dollars, or any sum, may be, and thus, by circumlocution, we accomplish the very thing, and induce the identical evil sought to be obviated by the Constitution. (Const., Art. IX, Sec. 3; Const. Debates, 757, *et seq.*; *Nougues v. Douglas*, 6 Cal. 65; *People v. Johnson*, 7 Cal. 499.)

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V. The Act is unconstitutional because it increases the pay of members and attachés. (Const., Art. IV, Sec. 33; Stats. 1864-5, 97, Secs. 1-3.)

VI. The Act is unconstitutional, inasmuch as it exempts the contingent funds created, and all money therein, from the action of the Board of Examiners, Controller, and Treasurer. (Const., Art. V, Sec. 21; Const. Debates, 161; 16 Cal. 26.) By the Act the incidental expenses incurred by the Legislature are exempted from the action of the Board of Examiners.

VII. The Act is a plain usurpation of executive power. It vests in either branch of the Legislature the power vested in the Board of Examiners; it vests the auditing and disbursing powers of the State in the Sergeant-at-Arms, an officer unknown to the Constitution—and so far as the contingent expenses of the Legislature are concerned makes him for the time being Treasurer and Controller. (21 Mo. 552; 10 Wis. 525; Const. Wis., Art. VI, Sec. 2.)

By the Court, WHITMAN, J.:

This is an application on behalf of Augustus Ash, Sergeant-at-Arms of the Assembly of the State of Nevada, now in session, for a writ of mandamus upon the Controller of the State, that he may issue to applicant two certain warrants, one for two hundred and eighty dollars, pay due relator by law as such Sergeant-at-Arms, and one for five thousand dollars as contingent fund of the Assembly, both claimed under the provisions of the Act of the present Legislature, entitled "An Act to create Legislative Funds," which is as follows:

"The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

"Section 1. For the purpose of paying the salaries of the members and attachés of the present Legislature, the mileage of the members, and the incidental expenses of the same, the State Treasurer is hereby authorized and required to set apart from the first moneys coming into the general fund, not otherwise specially appropriated, the sum of sixty-five thousand dollars in gold coin,

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which shall constitute a fund to be denominated 'The State Legislative Fund.' Any deficiency that may exist in the Legislative Fund of the last session may also be paid out of the Legislative Fund hereby created. The State Controller is hereby authorized and required to draw his warrants on said fund in favor of the members and attachés of the present Senate and Assembly for mileage and compensation due, when duly certified to him in accordance with law: *provided*, said warrants shall bear interest at the rate of fifteen per cent. per annum from date until paid, or advertised for payment, as provided in section number four.

"Sec. 2. The State Controller is hereby authorized and required to draw warrants payable out of the State Legislative Fund, created by the preceding section, in the sum of five thousand dollars, in favor of the Sergeant-at-Arms of the Assembly; and in the sum of four thousand dollars, in favor of the Sergeant-at-Arms of the Senate—said warrants to bear interest at the rate of fifteen per cent. per annum, from date, until paid, as provided in section four of this Act: for the purpose of defraying the incidental expenses of the two Houses—said amount to be held by those officers and paid out by them in such manner as their respective bodies shall by resolution direct. Said amounts are hereby exempted from the operation of 'An Act relating to the Board of Examiners, to define their duties and powers, and to impose certain duties on the Controller and Treasurer,' approved February 7th, A.D. 1865. Any balance remaining in the hands of either Sergeant-at-Arms, upon the adjournment of the Legislature, shall be paid to the State Treasurer, and revert to the General Fund."

"Sec. 4. The State Treasurer shall number and register in the order of presentation, in a book to be provided by him, all the warrants presented to him, drawn by the State Controller on the Legislative Fund and Contingent Funds; and whenever there shall be the sum of five thousand dollars in the hands of the Treasurer, he shall give notice upon a bulletin board in his office setting forth the fact; and that warrants, bearing certain numbers and dates, shall be presented for payment, and upon presentation will be paid by him; and said warrants so advertised for payment shall cease bearing interest from the date of such notice.

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“Sec. 5. Nothing contained in this Act shall affect the provisions of ‘An Act entitled an Act to provide for the Payment of the Salaries of the Judges of the Supreme Court of the State of Nevada, passed February 21st, 1866.’”

The defendant refuses to issue either of said warrants, upon the ground that the Act is unconstitutional. The agreed facts are as follows :

1. The Assembly of the State of Nevada, at the present session of the Legislature, has created and appointed certain offices and employments, to wit: Committee Clerks—which said offices and employments were not created or authorized by any Act or resolution of the Legislature of the State of Nevada, until then in force, except as authorized by Act of January 21st, 1865.
2. That the compensation of said clerks and employés has been fixed at six dollars per diem by resolution, and the Sergeant-at-Arms of the Assembly has issued to said clerks, and each of them, his certain certificate of indebtedness, or skeleton script for the per diem of said clerks, which they now hold as evidence against the State of Nevada.
3. That the Senate of the State of Nevada, at the present session of the Legislature, has by resolution appointed William M. Cutter, Reporter of the Senate. That said Cutter has entered upon said office, and is now discharging the duties thereof.
4. The indebtedness of the State in outstanding interest-bearing bonds now equals and did equal, for ordinary State purposes prior to the Act of February 5th, 1869, the full sum of three hundred thousand dollars exclusive of interest.
5. There is no money in the State treasury, or in the General Fund thereof, applicable to the payment of the claims or indebtedness arising under the Act of February 5th, 1869.
6. No sum of money has been paid to any member or attaché of the present Legislature, nor has any warrant been issued to them for compensation or mileage by the Controller.
7. The Assembly at the present session, through its Sergeant-at-Arms, by resolution merely—and the Sergeant-at-Arms, upon his authority as such—has purchased articles of property, and incurred

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incidental expenses, and contracted indebtedness, amounting to _____ dollars—none of which claims have been acted upon by the Board of State Examiners, or presented to them for their action.

The case naturally divides into distinct propositions as to the separate warrants demanded, and will be so considered. The defendant recognizing the well-known axioms that the presumptions are in favor of the rightful exercise of the law-making power, and that the law should be sustained if there be any reasonable doubt of its unconstitutionality, contends that it is clearly repugnant to the Constitution, upon several grounds, which will be decided in their order of presentation.

The first violation alleged is of section twenty-one, article four, reading thus :

“Sec. 21. In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.”

It is evident from inspection of the statute, that it does not fall within the objection made, as no general law could be made applicable to the subject matter of the Act. Whether the determination of the question of the applicability or non-applicability of a general law in a given case is matter for legislation or judicial decision, is here not a vital point, and is not passed upon.

It is next objected that the Act creates State indebtedness above the constitutional limit of three hundred thousand dollars, and is therefore repugnant to section three of article nine of the Constitution, as follows :

“Sec. 3. For the purpose of enabling the State to transact its business upon a cash basis from its organization, the State may contract public debt; but such debt shall never in the aggregate, exclusive of interest, exceed the sum of three hundred thousand dollars, except for the purpose of defraying extraordinary expenses as hereinafter mentioned.

“Every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein; and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within twenty years from the pas-

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sage of such law ; and shall specially appropriate the proceeds of said taxes to the payment of said principal and interest ; and such appropriation shall not be repealed, nor the taxes be postponed or dismissed, until the principal and interest of said debts shall have been fully paid.

“Every contract of indebtedness entered into or assumed by, or on behalf of the State, when all its debts and liabilities amount to said sum before mentioned, shall be void and of no effect, except in cases of money borrowed to repel invasion, suppress insurrection, defend the State in time of war, or if hostilities be threatened, provide for the public defense.”

It was admitted in the course of the argument by counsel for defendant, that an appropriation of money by the Legislature, and the drawing of ordinary warrants thereon in anticipation of revenue, that being provided for as in the present case, by general revenue bill or otherwise, would not create a debt within the meaning of the section of the Constitution last cited, but the admission of counsel upon a grave question of this nature will not relieve the Court from its consideration. The matter must be viewed in its full bearing, and if the objection in its broadest sense be good, it must be sustained.

As an original proposition, it might be difficult satisfactorily to show why an appropriation of money, where no money existed, was not creating, or rather recognizing a preëxisting debt, especially where a warrant was drawn thereon, which though not a debt in itself, would naturally be supposed to be based upon one preëxisting, and to be the evidence thereof, but similar language in the Constitutions of other States had received judicial interpretation before the formation or adoption of the Constitution of the State of Nevada, and thus the legal presumption arises that the language was used with reference to such interpretation. This is article eight of the Constitution of California :

“The Legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion, or to suppress insurrection, unless the same shall be authorized by some

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law for some single object or work, to be distinctly specified therein, which law shall provide ways and means exclusive of loans for the payment of interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years of the time of the contracting thereof, and shall be unrepealable until the principal and interest thereof shall be paid and discharged; but no such law shall take effect until at a general election it shall have been submitted to the people and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law shall be applied only to the specific object therein stated, or to the debt thereby created; and such law shall be published in at least one newspaper in each judicial district, if one be published therein, throughout the State for three months next preceding the election at which it is submitted to the people."

Discussing that section in the case of *The State of California v. McCauley*, (15 Cal. 455) Chief Justice Field, delivering the opinion of the Court, says: "The eighth article was intended to prevent the State from running into debt and to keep her expenditures, except in certain cases, within the revenues. These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury. The appropriation of the moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the services operates in fact in the nature of a cash payment."

And again, in *McCauley v. Brooks*, (16 Cal. 28) he uses this language, speaking of the same section under review in the previous case: "To an appropriation within the meaning of the Constitution nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues. It constitutes indeed the authority of the Controller to

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draw his warrants, and of the Treasurer, when in funds, to pay the same, and that is all."

In the case of *Koppicus v. State Capitol Commissioners*, (16 Cal. 253) the same objection was raised to an Act of the Legislature, "authorizing the erection of a State Capitol, at a cost not to exceed five hundred thousand dollars, and empowering the Commissioners to contract to the extent of one hundred thousand dollars." The same Judge says: "For the liabilities which may be thus incurred the Act makes provisions; it appropriates for that purpose the requisite sum, thus anticipating their existence and charging them as they arise."

These cases, decided in 1860, have been since commented upon and fully sustained in the case of *The People v. Pacheco*, (27 Cal. 175) decided five years thereafter. In the State of Ohio a similar constitutional provision exists with a further restriction, limiting prospective appropriations to a term of two years. In the case of *The State v. Medbury*, (7 Ohio, State, 529) upon very elaborate discussion, Justice Swann, for the Court, admits the proposition to the full extent claimed by the California decisions, subject only to the two years' restriction. He says: "So long as this financial system is carried out in accordance with the requirements of the Constitution, (two years' restriction) unless there is a failure or defect of revenue, or the General Assembly have failed for some cause to provide revenue sufficient to meet the claims against the State, they do not and cannot accumulate into a debt. Under this system of prompt payment of expenses and claims as they accrue, there is undoubtedly, after the accruing of the claim and before its actual presentation and payment, a period of time intervening in which the claim exists unpaid; but to hold that for this reason a debt is created, would be the misapplication of the term 'debt,' and substituting for the fiscal period a point of time between the accruing of a claim and its payment for the purpose of finding a debt; but appropriations having been previously made and revenue provided for payment as prescribed by the Constitution, such debts, if they may be so called, are in fact, in respect of the fiscal year, provided for with a view to immediate adjustment and payment. Such financial transactions are not therefore to be deemed debts."

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The admission of counsel in this case may then be considered to be correctly based, as the statute appropriates money to come into the treasury, sets it apart in a special fund, and directs warrants to be drawn on this fund. But there is another ground upon which it may be properly claimed that the particular appropriation of the statute under consideration does not increase the State debt within the meaning of the Constitution. That instrument provides for a Legislature, and recognizes incidentally a Secretary of the Senate, a Clerk of the Assembly, and other officers and employes, and, by necessary implication, all the ordinary adjuncts of a legislative body. The Legislature is not only an important but a vital branch of the State Government, as without it no taxes can be levied or revenue collected, no appropriation made, and consequently no money drawn from the treasury.

Without the vivifying powers of the Legislature the State Government would become defunct. If, then, the Constitution did not expressly authorize its expenditures, the necessary implication would be to that effect; otherwise, the Constitution would be the destruction of the very thing it was ordained to organize and erect. Whatever expense there is necessary to carry on the Legislature is authorized by the Constitution, and may be incurred while that instrument exists, unless amendment be made in that regard, subject only to such other limitations as there may be. From both standpoints, then, it follows that neither in making the appropriation nor in authorizing the drawing of ordinary warrants thereon is the statute unconstitutional.

Defendant, however, contends that a different rule obtains when interest is allowed on warrants. If it be true that the issuance of a warrant creates no debt, and that no debt, within the purview of the Constitution, preëxisted, as would follow from the reasoning of the cases previously cited, how can the addition of interest make that an unconstitutional debt which was not so before? Interest constitutes no part of the original demand; it is simply a statutory allowance for delay. If the money be in the treasury, then no interest accrues; if not, the party holding the warrant is compensated for waiting until there is. It may be said that the allowance of interest presupposes a debt, for that there can be no interest

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except upon some principal; but upon the theory of the cases cited there is a debt, but not a debt repugnant to the Constitution, as it is only contingent—a debt existent, but payable only upon the collection of revenues. In this view, as the interest follows the principal, that being contingent, so the interest. Upon the basis that legislative expenses were contemplated and authorized by the Constitution, the question of interest resolves itself into a matter purely of policy or expediency. Suffice it to say, that with such question this Court has nothing to do; in that regard the Legislature is supreme. It might, unless prohibited by some other provision of the Constitution, fix the rate of interest at one hundred per cent. per minute (as suggested by counsel); it might donate the money of the State; it might place the rate of taxation so high as to utterly destroy all industrial interests: but that a power may be abused is no argument against either its existence or its exercise. For the proper exercise of its power the Legislature is responsible morally in the consciences of its individual members, and politically to their constituents.

It is further objected that the statute is repugnant to section thirty-three of article four of the Constitution, which says:

“Sec. 33. The members of the Legislature shall receive for their services a compensation to be fixed by law, and paid out of the public treasury; but no increase of such compensation shall take effect during the term for which the members of either House shall have been elected: *provided*, that an appropriation may be made for the payment of such actual expenses as members of the Legislature may incur for postage, express charges, newspapers and stationery, not exceeding the sum of sixty dollars for any general or special session, to each member, and furthermore provided that the Speaker of the Assembly, and Lieutenant-Governor as President of the Senate, shall each, during the time of their actual attendance as such presiding officers, receive an additional allowance of two dollars per diem.”

The pay of a member, lawful officer, attaché, or employé of the Legislature, or either branch thereof, is due when his service is rendered, and it is for the Legislature to say when that pay shall be drawn, whether daily, weekly, monthly or otherwise, and

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the presumption is not that the agreement implied in such service is to wait for an indefinite length of time or any time for the payment. The warrant is drawn only for so much money—the actual amount of pay fixed by law. • If the money be in the treasury the money is presently paid, if not interest follows, not as a compensation for service, but as damages for delay. This allowance of interest may be an invidious distinction against other creditors of the State, but in the same light, so is the immediate appropriation of money and its withdrawal from the General Fund, but it is conceded that the Legislature have the power to do the latter. In both cases the question is not of power but of policy, and that this Court cannot consider. Some argument on the part of defendant is addressed to the very probable presumption that the main object of the allowance of interest is to facilitate the sale of the warrants in the market, but it is not pretended that the interest allowed would advance the price of the warrant above the legal compensation of the party to whom it is issued. A case might be imagined presenting that question, when it arises it will be time to decide it. There is no constitutional reason why warrants should not be so issued as to afford to the holder their full nominal value. By the allowance of interest, taxation will be increased; but if in this or any other instance, the people object in an aggregate mass to that which is ordinarily each man's individual action, that is, paying interest, when there is delay in payment of the principal, that is a matter of accounting between them and their representatives.

From what has been said it follows that the statute is not unconstitutional upon the grounds thus far urged and noticed, and therefore to that extent must be sustained. As there is no other nor further constitutional objection to that portion of the statute affecting the two hundred and eighty-dollar warrant, the applicant is entitled to his writ upon the defendant for its issuance.

To that portion of the statute directing the drawing of the five thousand-dollar warrant it is objected—

1st. That it exempts the Contingent Fund created from the action of the Board of Examiners, Controller, and Treasurer. Portion of this and other objections before and to be noticed, was argued upon certain statutes. If this statute conflicts with those

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cited, being later, it controls. The constitutional objection is based upon the following provision: "Art. V, Sec. 21: The Governor, Secretary of State, and Attorney-General, shall constitute a Board of State Prison Commissioners, which Board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall also constitute a Board of Examiners, with power to examine all claims against the State, (except salaries or compensation of officers fixed by law) and perform such other duties as may be prescribed by law. And no claim against the State (except salaries or compensation of officers fixed by law) shall be passed upon by the Legislature without having been considered and acted upon by said Board of Examiners."

The defendant contends that this section imposes the action of the Board of Examiners as a jurisdictional pre-requisite to any legislative action upon any real or assumed claim against the State for the payment of money, "except salaries or compensation of officers fixed by law," and accepting the logical consequence of this position, admits that such view would include all bonds, interest thereon, and many other matters heretofore provided by the Legislature to be paid without such procedure. If he be right and action so futile must be had, submission should be made; but from a consideration of the section referred to, a more natural, and to the credit of its framers, intelligent conclusion appears. One premise of the position is, that the section creates the Board of Examiners as a check to legislative extravagance. If such was the intention there is a sad failure of accomplishment. An intended check without the slightest means of enforcement—for under the section the only power given is to examine, and the ultimate and only power of adoption or rejection, is in the very body intended to be checked. A checking board requiring legislative action to make it even advisory! It is unjust to the members of the constitutional convention to accuse them of such fatuity. The Board of Examiners was intended to subserve an important purpose, but not that on which defendant insists. That it prescribes a pre-requisite to legislative action is true, (whether of form or essence will be considered hereafter) and for that very reason can apply only to such claims as require legislative action upon them as

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claims—not creative action but adoptive or rejective action. The exception strengthens this view. A salary or compensation which required no legislative action could not be brought up therefor; if not, then it could not be examined, as examination is only a prerequisite for such action, but there might be a salary or compensation requiring further legislative action, as for instance an appropriation, such salary or compensation is therefore excepted from examination. A claim is a demand by some one other than the State against it for money or property; but when the claim originates with the State, or in its behalf, and contemporaneously with its origin, and means and manner of payment are provided, as in the case of a bond, it does not then constitute a claim proper against the State, but a liquidated and legalized demand against the treasury. It cannot be doubted that, except when limited by the Constitution, a Legislature has power to appropriate money as it sees fit, and only by such appropriation can money be drawn from the treasury. “No money shall be drawn from the treasury but in consequence of appropriations made by law. An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws of every regular session of the Legislature.” (Const., Art. IV, Sec. 19.)

The only prohibitory provisions are: First. Section 28, Article IV, as follows: “No money shall be drawn from the State treasury as salary or compensation to any officer or employé of the Legislature, or either branch thereof, except in cases where such salary or compensation has been fixed by a law in force prior to the election or appointment of such officer or employé, and the salary or compensation so fixed shall neither be increased or diminished so as to apply to any officer or employé of the Legislature, or either branch thereof, at such session: *provided*, that this restriction shall not apply to the first session of the Legislature.” Second. Section 9, Article VIII, as follows: “The State shall not donate or loan money or its credit, subscribe to, or be interested in, the stock of any company, association, or corporation, except corporations for educational or charitable purposes.”

The Legislature then has power to appropriate money for its contingent expenses, and it only remains to be seen whether, having

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appropriated, it may disburse ; if it donates, it delegates disbursement. It would be a strange conclusion that it could delegate powers it has not. If the Legislature has power to take and use money from the treasury for one purpose, it has for all, subject to the provisions last cited, and, therefore, in the present instance, its action is constitutional, unless thereby a claim against the State is passed upon contrary to the meaning of the provision of section twenty-one, article five, of the Constitution, as interpreted by defendant.

Incidental expenses to accrue cannot be held to constitute claims proper. The Legislature takes the money, each branch places a certain amount in the hands of its Sergeant-at-Arms ; whatever it is deemed proper to spend money for, in the nature of an incidental expense, is decided, and on that account the officer is directed to make disbursement. Who has any claim against the State ? Not the party to whom the officer pays the money, for, in the first place, he is not dealing with the State or its agent, but only with the agent of one portion of one branch of the State Government ; and secondly, he is paid. Not the officer, for he has the money in his hands. Not either branch of the Legislature, for it has money in the hands of its agent. There can be no legal claim for money except upon a matter of debt or damage, and then there could be no legal claim against the State except ; it owed and having paid, by its Treasurer, upon the warrant of its Controller, it could owe nothing. The question here is, so far as relates to incidental expenses to accrue, not as to the power of the Legislature to pass upon claims, but to appropriate and use the money. Such power it has, subject to the constitutional restrictions contained in section twenty-eight, article four, and section nine, article eight. Expenses already accrued, however, stand differently, although they may originally have been created by the separate action of each body, the statute in question recognizes them as claims so far as it may properly do so ; of course, it does not upon its face and cannot recognize any matter as a claim which is within the restriction of section twenty-eight, article four, of the Constitution. Being claims against the State, then, they must be acted upon by the Board of Examiners before payment, unless the Legislature has the power to pass upon them without such action.

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It is said by plaintiff that no evidence exists that such claims have not been, or will not be, submitted to the Board of Examiners; if not, yet this is legitimate matter for consideration, as the bill provides that the amount paid to the Sergeants-at-Arms is to be held and paid out by them respectively upon resolution of the Senate and Assembly, and the bill being objected to generally as unconstitutional, should be viewed in all its aspects.

It is argued by counsel for plaintiff that if the Board of Examiners should, under the Constitution, act upon a claim before the Legislature, may pass upon it; still, that this is a matter of form rather than of substance, and that the Constitution is directory rather than mandatory to the Legislature. The Constitution contains several articles, the general scope of each being indicated by its heading. The section under consideration is found in article five, entitled "Executive Department," and proposes, primarily, to give power to certain executive officers. In addition thereto it provides as follows: "And no claim against the State (except salaries or compensation of officers fixed by law) shall be passed upon by the Legislature without having been considered and acted upon by said Board of Examiners." No penalty is affixed should the Legislature disregard this provision, as in some other instances, as with regard to contracting debts above the prescribed amount, as in matter of prohibition to Judges of the Supreme Court absenting themselves from the State for more than ninety consecutive days, in which case the offending Judge is deemed to have vacated his office. Suppose the passage of a statute whereby the Legislature passes upon a claim against the State, which has never been acted upon by the Board of Examiners. Is such statute void, or only irregular? The mode prescribed by the Constitution has not been followed; what is the consequence? If there is nothing upon the face of the bill to show that the Board of Examiners have not acted, how is that fact to be ascertained? Courts have generally held that, if it be proper to look behind a statute regular on its face, to ascertain whether it had passed constitutionally, that such examination was not by jury trial of fact, but by inspection by the Court of the legislative record contained in the office of the Secretary of State, and of that only. Under this view it would be

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impossible to say that the expenses now being considered had or had not been passed upon by the Board of Examiners, unless recourse was had to the records of such Board, and to inspect such record would be, if previous decisions as to the extent of inspection are to be followed, to make such record part of every bill passing upon a claim.

Again, the Constitution cannot be violated by permission of judicial authority, by indirection, and yet it would be difficult to suggest a remedy for an indirect violation with regard to this very section. Suppose A had a claim against the State which he had not submitted to the Board of Examiners, and the Legislature knowing the fact passed the bill, saying nothing about the claim, but donating absolutely the amount. Here there is no passing upon the claim, either so far as the face of the bill goes, nor practically; and yet an object is accomplished indirectly, which, it is said, cannot be directly.

So far as cotemporaneous legislation (always considered in force in constitutional interpretation) is concerned, it has treated the provisions of the section in question as inapplicable to legislative expenses. At every session of the Legislature since the adoption of the Constitution a law similar to the present has been passed. (Stats. 1864-5, 329; Stats. 1866, 45; Stats. 1867, 159.) Some members of the Constitutional Convention have been members of the Legislature. The proposer of the constitutional section in question was in the Assembly of 1866. The Attorney-General for the first two years of the State Government was also a member of the Constitutional Convention.

The section, as has been said before, confers no power save that of examination upon the Board, there being no power of adjudication conferred, why may not the Legislature, the ultimate tribunal, act without previous examination, that examination being of no binding force? While none of these considerations render it clear that the required pre-requisite of examination is of form rather than of substance, nor that the section, so far as the Legislature is concerned, is directory and not mandatory, yet it is impossible to decide the contrary without a reasonable doubt. Such doubt ex-

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isting, under the well-established rule of law, the statute cannot be declared unconstitutional, even as to the point now in question.

Says Mr. Sedgwick, in his Treatise on Statutory and Constitutional Law, page 482: "The leading rule in regard to a judicial construction of the constitutional provisions is a wise and sound one, which declares in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the Act in question; and that the Courts will only interfere in cases of clear and unquestioned violation of the fundamental law. It has been repeatedly said that the presumption is that every State statute, the object and provisions of which are among the acknowledged powers of legislation, is valid and constitutional. And such presumption is not to be overcome, unless the contrary is clearly demonstrated."

"Courts ought not," says the learned Chancellor of the State of New York, "except in case admitting of no reasonable doubt, take upon them to say, that the Legislature has exceeded its power and violated the Constitution, especially when the legislative construction has been given to the Constitution by those who framed its provisions and contemporaneous with its adoption." (See also *Fletcher v. Peck*, 6 Cranch, 87; *Ex parte McCollum*, 1 Cowen, 564; *Newell v. The People*, 3 Seld. 109; *Clark v. The People*, 26 Wend. 599; *Lane et al. v. Dorman et ux.*, 3 Scam. 238; *Foster et al. v. Essex Bank*, 16 Mass. 245; *Farmers' and Mechanics' Bank v. Smith*, 3 Serg. & R. 63; *Brown v. Buzan*, 24 Ind. 194; *Morrison v. Springer*, 15 Iowa, 347; *Adams v. Howe et al.*, 14 Mass. 342.)

Such being the case, the defendant has unlawfully refused to issue the five thousand-dollar warrant, and the writ must issue as prayed.

Let the writ issue.

By JOHNSON, J.:

I concur in the reasoning and conclusions attained in the opinion of Justice Whitman, except so far as it covers the last branch of the case, respecting the five thousand-dollar warrant, from which I dissent, for reasons which will be embodied in a separate opinion.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
APRIL TERM, 1869.

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JOSEPH CARDINAL, RESPONDENT, v. THOMAS J. EDWARDS, APPELLANT.

RIGHT OF PROPERTY ON EXECUTORY SALE OF CHATTELS. Cardinal agreed to sell, transfer, and convey to Archambeauld a team of horses as soon as certain specified installments of price should be paid, and in the meanwhile to allow Archambeauld to have possession of and work the team until default should be made in any one of the installments; said possession, however, not to lessen or impair Cardinal's title to the property so long as any installment should remain due: *Held*, that until the installments were paid, the contract was executory, and the right of property remained in Cardinal, and could not be held as against him under an execution against Archambeauld.

RIGHT OF PROPERTY ON CONDITIONAL SALE. A conditional sale of personal property passes no title to the vendee which can be taken by his creditors until the performance of the conditions, unless there be a waiver of the condition by an absolute and unconditional delivery of the property.

STATUTORY LIEN FOR KEEPING ANIMALS LOST BY SURRENDER OF POSSESSION. Where a stable-keeper boarded a team of horses, but allowed them every day to be driven away to work, and on one occasion after being so driven away they were not returned: *Held*, that though he might under the statute (Statutes of 1866, 65) have retained possession of the horses, and insisted upon his lien, yet, having allowed them to be driven away, he relinquished possession and thereby lost his right of lien.

Cardinal v. Edwards.

FIXING FUTURE TIME OF PAYMENT DESTROYS LIEN. The fixing of a future time of payment for the keeping or boarding of animals, such as an agreement to pay on the first of each month, destroys the lien contemplated by the Statute of 1866. (Statutes of 1866, 65.)

APPEAL from the District Court of the Second Judicial District, Ormsby County.

In May, 1868, Eugene Archambeauld presented himself at the hay-yard of Jens C. Sorrensen in Carson City, represented that he had purchased a six-horse team, and made an arrangement with Sorrensen to have the animals fed there, agreeing to pay the charges therefor on the first of every month. The team was engaged, with Sorrensen's knowledge and consent, in hauling wood to Silver City, Gold Hill, and other places, and stopped and was fed at the hay-yard; part of the time every night, and part of the time every second or third night, for about a month and a half, Archambeauld during the whole time having the absolute and exclusive control of it, directing its movements, receiving the proceeds of its labor, and paying a part of the bill for feeding. On July 17th, 1868, the team was driven from the yard with a load of wood as usual, Archambeauld being in charge. Sorrensen was present at the time, but had no intimation that it was being removed *not to return*. On that or the next night Archambeauld, without having returned to the yard, absconded, leaving the team at the Half-way House, between Virginia City and Carson; and the next day Joseph Cardinal took possession of it, claiming the same as his own property.

On July 20th, Sorrensen commenced suit before a Justice of the Peace against Archambeauld, to recover two hundred and sixty-five dollars and seventy-five cents, the balance on his feed bill up to July 17th, and caused the animals to be attached; in which suit he obtained judgment against Archambeauld for the amount of his bill and costs, and was declared to hold a special statutory lien upon the animals. Execution on that judgment being issued and placed in the hands of Thomas J. Edwards, the Sheriff of Ormsby County, he levied upon and seized possession of the animals under the writ.

Cardinal, whose relation to the property is stated in the opinion,

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then commenced this action, which was replevin against the Sheriff, and obtained a judgment to the effect that he was the owner of and entitled to the possession of the property, and that Sorrensen had no right to it. From this judgment, and an order overruling his motion for a new trial, defendant appealed.

Clayton & Davis, for Appellant.

I. The sale of the property from Cardinal to Archambeauld was an absolute sale. There is no dispute that there was an immediate delivery, and an actual and continued change of possession of the property. It amounted to an absolute sale from Cardinal, on credit, to Archambeauld.

II. The written agreement, entered into between Cardinal and Archambeauld, was intended as a security to Cardinal for the debt; and under the well-established rule "that where the transaction resolves itself into a security, it is a mortgage," this agreement was, to all intents and purposes, a chattel mortgage, and as such was invalid as against Sorrensen. (Statutes of 1861, Chap. IX, Sec. 66; *Meyer v. Gorham*, 5 Cal. 324; *Hackett v. Manlove*, 14 Cal. 89.)

While this chattel mortgage was invalid as to third parties, it was valid as to the parties thereto; and Cardinal, having accepted a mortgage of the property from Archambeauld, thereby admits title in Archambeauld, and is estopped to set up and claim under his original title. (*Sprague v. Branch*, 3 Cushing, 575.)

III. In the action of replevin, the plaintiff recovers by the strength of his own title, (1 Ind. 54; 20 Conn. 364; 31 Ill. 120); and in the case at bar having admitted title in Archambeauld by accepting a mortgage, he can only claim under the mortgage, which was invalid as to third parties under the statute. In the action of replevin, the defendant may plead property in himself or in a stranger, and if he succeed on the trial he will be entitled to a return of the property, and to damages for the detention thereof.

It is not necessary that he connect himself with the title of the stranger. It is sufficient for him that the right of property is not in the plaintiff, who must recover on the strength of his own title. (1 Gilm. 365; 21 Wend. 205; 1 Pick. 257.) In the case at

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bar, plaintiff had certainly no right to the immediate possession. He had simply taken possession of the property at the Half-way House the morning after Archambeauld absconded, without any warrant of law. It is true, he says that Archambeauld never made any of the payments called for in the written agreement; but at the time he took possession none of the installments were due unless it was the first, which was due on demand, and no demand was shown or default made. It is a well-settled rule that where a demand is necessary and is not made, or cannot be made, the party must resort to his bill.

IV. The statute entitled "An Act to Secure Liens to Ranchmen and other persons," (Statutes of 1866, 65) declares a lien upon animals to secure the feed-bill, authorizing their detention until all charges are paid, or until the animals can be sold to satisfy such claim; and further providing, that in the event of the removal of the animals by *any person*, without the knowledge and consent of the person feeding the same, the person so offending shall be liable to fine and imprisonment; but that nothing therein stated shall operate to release the owner from the lien. Is it not absurd to say that because Sorrensen was present when the team was driven away from his yard on July 17th, and did not object to its removal, that it was not removed without his knowledge and consent? It left with a load of wood as usual, and he supposed of course that it was leaving temporarily, as it had done fifty times before. He says that if he had been advised of Archambeauld's intention to remove the team not to return he would not have permitted it to leave until the balance was paid.

V. Sections sixty-four and sixty-six of the Statute of Frauds are designed to insure probity and fair dealing among men, by keeping the possession of personal property in the hands of the real owners; and to prevent a false credit being acquired by one party, having all the *indiciæ* of ownership, while the real title is in another. (*Doak v. Brubaker*, 1 Nev. 218.) The law is clear as regards the possession in chattel mortgages, and must apply equally to conditional sales of personal property. In the case at bar—even admitting that the written agreement between Cardinal and Archambeauld shows a conditional sale, and that no title

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passed to Archambeauld—yet Cardinal voluntarily delivered the possession of the property to Archambeauld; and the latter was apparently vested, by the act of Cardinal, with all the rights of an absolute owner—which rights Archambeauld exercised absolutely for nearly two months, and thereby acquired a false credit.

Kent (3 Kent's Com. 498) lays down the rule, that where there has been a conditional sale and delivery of property, coupled with a condition that security shall be furnished or the property paid for at a future day, the right of the vendor will be good as against the buyer and his voluntary assignee, but not as against a *bona fide* purchaser from the vendor. (See also *Fleeman v. McKean*, 25 Barb. 484; *Hagerty v. Palmer*, 6 John's Ch. R. 437; *Hussey v. Thornton*, 4 Mass. 405; *Waitz v. Green*, 35 Barb. 590; *Callwell v. Bartlet*, 3 Duer, 352; *Smith v. Lynes*, 1 Seld. 42; 1 Paige, 312; 1 Edw. Ch. 146; 37 Barb. 509.)

R. M. Clarke and *T. D. Edwards*, for Respondent.

[No brief on file.]

By the Court, LEWIS, C. J.:

The agreement entered into between the plaintiff and Archambeauld on the thirty-first day of May and which was afterwards on the sixth of July reduced to writing, was simply an executory contract of sale, to be executed or completed when the stipulated payments were made by the latter. That it was not the intention to transfer the title from the plaintiff to Archambeauld is a fact which admits of no doubt whatever, if the written instrument itself is to be received as evidence of the intention. The plaintiff by it "contracts, promises, and agrees to sell, transfer, and convey to the party of the second part" (Archambeauld) the property in question, "as soon as he shall have paid therefor," which he agreed to do in installments, as follows: Two hundred dollars on demand, one hundred dollars on the last day of July, and one hundred dollars on the last days of August, September, and October. Here is certainly no present sale or transfer of title. It is as clearly an executory contract of sale as language could have made it. The contract, however, further provides, that the party of the first part

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(Cardinal) "hereby agrees to let the said party of the second part have the privilege of using and working the said wagon, animals, and harnesses, until such time as he shall be in default in making any of the stipulated payments—the said party of the second part keeping the said property in good working order and condition at his own cost and expense, and without charge against the first party. But this instrument is not intended to affect or in any manner lessen or impair the title of the said first party to the said property, so long as any portion of the said sum of six hundred dollars shall remain due from the party of the second part." By this latter clause of the agreement, Archambeauld had the right of possession of the property; but that right was subject to the condition of payment of the price at the specified times. There was certainly no transfer of the right of property by the instrument; and we apprehend the mere delivery of the possession to be held only upon condition could not operate to invest him with it. He was not even to have the possession if he failed to make payments of any of the installments of the purchase money. At the time this suit was brought he was in default, and had been for nearly a month. The title to the property remaining in Cardinal, it was not subject to levy and sale upon execution against Archambeauld. If Archambeauld ever had any interest which could be so taken, it was simply the right of possession until the last day of July, at which time there was a default in the payment of the installment then due. At that time, if not before, Cardinal became reinvested with the right of possession, and as this action was not commenced until the seventeenth of November—the day when the property was taken upon execution by the defendant—it is clear that the plaintiff should recover. If the transaction between Cardinal and Archambeauld were treated as a conditional sale, which is certainly the most favorable view for the defendant which can possibly be taken of it, still there can be no doubt of the plaintiff's right to recover: for it is a rule, as firmly established as any elementary principle of the law, that a conditional sale passes no title to the vendee which can be taken by his creditors until the performance of the condition, unless there be a waiver of the condition by an absolute and unconditional delivery of the property. (*Strong v. Taylor*, 2 Hill,

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326; *Herring v. Poffock*, 15 New York, 409; *Barrett v. Pritchard*, 2 Pick. 512; *Coggell and Harfer v. New Haven Railroad*, 3 Gray, 545; *Hart et al. v. Carpenter*, 24 Conn. 427; 33 N. Hamp. 66.)

These cases are directly in point, and decisive of this branch of the case. But it is contended that Sorrensen, the plaintiff in the execution against Archambeauld, had under the statute of this State a lien on the property for the sum of two hundred and sixty-eight dollars, and the right to hold possession and sell the same to satisfy such claim. The statute referred to declares, that "any ranchman, or other person or persons, keeping corrals, livery or feed stables, or furnishing hay, grain, pasture, or otherwise boarding any horse or horses, mule or mules, ox or oxen, or other animals, shall have a lien upon and retain possession of the same, or a sufficient number thereof, until all reasonable charges are paid, or suit can be brought and judgment obtained for the amount of such charges, and execution issued and levied on said property." It is true, under this statute, Sorrensen might have had a lien upon the animals, and held possession of them for the feed furnished while they were under Archambeauld's control—had he claimed such a right; but instead of doing so he relinquished the possession, or rather, allowed Archambeauld to take them away without interposing any objection, or even having claimed the right or declared his intention to hold them for his charges. A voluntary relinquishment or surrender of the possession always destroys the lien. (2 Kent's Commentaries, 887; 1 East, 4; 7 East, 5.)

That Sorrensen was not present when the animals were taken away can make no difference, for he had never pretended to claim a lien on them, and had always allowed them to be taken away every morning before as upon the last. Had he intended to claim a lien upon the property he should have made it known in some way. In fact nothing is clearer than that he had no intention of claiming such lien until he ascertained that Archambeauld had absconded and the plaintiff obtained possession of the animals. He cannot, therefore, say that they were taken from his possession by fraud, or force, or against his will. Had it been his will to hold possession he undoubtedly could have done so. So, too, unless the

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statute changes the old rule, which it does not seem to do, the fixing a future time of payment as was done in this case, Archambeauld having agreed to pay the charges on the first of each month, destroyed Sorrensen's right of lien. (2 Kent's Commentaries, 886, 882; 4 Barn. & Ald. 50.) As the plaintiff was the owner, and in the possession of the property at the time it was seized under the execution against Archambeauld, it was unlawfully taken, and he is entitled to recover it. The judgment was right and must be affirmed.

JOHNSON, J., did not participate in the foregoing decision.

THE STATE OF NEVADA, RESPONDENT, v. JAMES WILSON, APPELLANT.

ERRORS NOT PROPERLY PRESENTED WILL NOT BE REGARDED. Where a transcript on appeal in a criminal case contained no bill of exceptions and no statement either certified by the Judge or agreed to by the attorneys: *Held*, that there was nothing for the consideration of the Appellate Court but the indictment, the minutes, and the instructions.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The defendant was indicted at the August Term, 1868, for an assault, with intent to commit murder, upon Lafayette Herbet, on June 11th, 1868, and was convicted as charged in the indictment. His motion for a new trial having been overruled, an appeal was taken; but, as stated in the opinion, there was no bill of exceptions contained in the transcript, nor did the statement appear to have been certified by the Judge or agreed to by the attorneys.

W. C. Kennedy, for Appellant.

R. M. Clarke, Attorney-General, for Respondent.

By the Court, WHITMAN, J.:

This appeal is very imperfectly presented—a matter to be

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regretted in any case, particularly in one involving personal liberty. The transcript contains no bill of exceptions, and what therein purports to be a statement is neither certified by the District Judge, nor agreed to by the attorneys. There is nothing for the consideration of this Court but the indictment, the minutes of the District Court, and its instructions. As no error appears in either, the judgment is affirmed.

JOHNSON, J., did not participate in the above decision.

ROBERT ROBINSON *et als.*, RESPONDENTS, v. THE IMPERIAL SILVER MINING COMPANY, APPELLANT.

LOCATION AND POSSESSION OF LAND FOR MILL SITE AND WATER RIGHT. Black & Eastman, in December, 1859, posted a notice on a tree on the bank of Carson River, of the location by them of a water right commencing at that point, and of a right of way for a ditch of a certain capacity to a rocky bend of the river below, and within the next six months did some fifteen or twenty days' work on the ditch but not sufficient to make it of any practical use; and they also erected a monument of stones at a point suitable for a mill site, on the river below the rocky bend; after which nothing further was done until October, 1860, when DeGroot entered: *Held*, not sufficient acts on the part of Black & Eastman to give them actual possession of the land traversed by the ditch, or of the mill site, nor to prevent DeGroot's entry and appropriation of them.

ACTUAL POSSESSION OF LAND—WHAT. The possession of public land necessary to be shown to enable a claimant relying solely upon prior possession to recover in ejectment, must be an actual occupation—a complete subjugation to the will and control, a *pedis possessio*. The mere assertion of title, the casual or occasional doing of some acts on the land, or the bare marking of boundaries, have never been held sufficient after the lapse of a sufficient time to make such inclosures or improvements as may be necessary to give actual possession. **STAININGER v. ANDREWS**, (4 Nev. 59) to the effect that a person claiming public land should be deemed in the actual possession of all within his marked boundaries while diligently prosecuting the work necessary to subject it to his dominion or control, cited with approval.

APPROPRIATION OF RIGHT OF WAY, NOT AN APPROPRIATION OF A TRACT OF LAND. A notice of appropriation of a right of way for a water ditch is not sufficient as a notice of appropriation of the land upon the sides of it.

DIFFERENCE BETWEEN APPROPRIATIONS OF LAND AND WATER. Public land is appropriated by one character of act, water by another. The digging of a ditch,

5	44
8	108
10	81
10	382
10	387
11	161
19	125
7*	273
5	44
21	258
30*	688

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on public land is not an appropriation of land sufficient for a mill site, nor is the mere appropriation of a mill site an appropriation of water for milling purposes.

A DEED OF A WATER-RIGHT DOES NOT CONVEY A MILL SITE. A deed conveying all the water of a river between certain points "for the purposes and use of machinery or ditches, or for any other uses," does not convey the land of a mill site on the river.

TOWN SITE APPROPRIATIONS. A private survey for a town site was made of a tract of land, including certain premises claimed by other parties, and not as a part of the town site, which premises were not subdivided into lots like the balance of the tract, nor plotted on the map thereof, nor were they fenced or improved: *Held*, that the owners of the town site, though they might possess and own the lots subdivided, staked out and plotted by them without fencing or other improvement, they could not be held to have appropriated the premises not so subdivided, and had no possession of them.

FORCIBLE INTERRUPTION OF SETTLEMENT ON PUBLIC LAND. DeGroot, having entered upon certain public land under the Utah Statute of 1852 (Utah Stats. 1852, 175) and caused it to be surveyed, was engaged in fencing it, when he was forcibly driven off: *Held*, that by a compliance with the law so far as he could or was permitted, he acquired a title which entitled him to the possession of the land as against all persons except the government.

SURVEY FOR SETTLEMENT UNDER UTAH STATUTE. Under the Act of 1852, (Utah Stats. 1852, 175) requiring surveys for the purposes of settlement to be made by the County Surveyor, or survey made by persons employed by him and acting under his direction and certified by him, is sufficient.

CONSTRUCTION OF STATUTE—OFFICIAL ACTS BY EMPLOYEES. Where a statute (Utah Stats. 1852, 175) provided that "the County Surveyor shall within thirty days after completing any survey make true copies, etc.": *Held*, that a survey, not made by the officer personally but by persons employed by him and acting under his direction, if adopted as his act and certified to by him as such, was a compliance with the law.

PRESUMPTION IN FAVOR OF SETTLER INTERRUPTED IN HIS SETTLEMENT. In a suit for the possession of public land claimed by the plaintiff under the Utah laws, (Utah Stats. 1852, 175, and 1855, 271) where it appeared that he had entered in good faith, and had the land surveyed and was proceeding to fence it when the defendant forcibly drove him off: *Held*, that it would be presumed, even although the fence then being built was not of sufficient character, that an inclosure in all respects sufficient would have been completed.

NO ADVANTAGE OF ONE'S OWN WRONG. The law permits no person to profit by his own wrong.

FOREIGN CORPORATION CANNOT PLEAD STATUTE OF LIMITATIONS. Foreign corporations are within the exception of the Statute of Limitations as to persons absent from the State when a cause of action accrues against them.

CONSTRUCTION OF STATUTE OF LIMITATION. Section twenty-one of the Statute of Limitations, (Stats. 1861) in the use of the expression "cause of action," includes real action or actions as to real estate as well as personal action.

CHOLLAR POTOSI CO. v. KENNEDY, (3 Nev. 361) in so far as it expresses an opinion

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that a foreign corporation is entitled to avail itself of the bar of the Statute of Limitations in an action concerning real property, disapproved and declared not the decision of the Court.

ERRORS NOT PREJUDICIAL. A judgment will not be reversed on account of error in an instruction to the jury, when it appears that the instruction could not possibly have injured the party complaining or misled the jury to his prejudice.

NO REVERSAL FOR ERROR WHERE JUDGMENT CLEARLY RIGHT. A verdict which is undoubtedly right upon the evidence, that is, so clearly right that if it were the other way it would be considered contrary to the evidence, should not be set aside because of the admission of improper evidence or the giving of incorrect instructions.

ON PETITION FOR REHEARING: VESTED RIGHTS UNDER UTAH SETTLERS' STATUTE—REPEAL OF STATUTES. The Statute of Utah Territory relating to settlements on public land (Utah Stats. 1852, 175; 1855, 176; and 1855, 271) which declared that in certain cases the Surveyor's certificate of survey should "be title of possession to the person or persons holding the same," gave to such certificate the character of a title as against all save the General Government; and after the laws had been complied with and a title obtained under them, the repeal of the laws could not destroy the title so acquired.

OBJECTIONS FOR DEFECT OF EVIDENCE NOT MADE IN COURT BELOW. An objection on account of a defect in the evidence, which would have been proper when the evidence was produced but might have been removed if then made, will not be allowed to be raised for the first time in the Appellate Court.

GROSETTA v. HUNT ET ALS., in so far as it expresses an opinion as to the necessity of filing a copy of survey with the Surveyor-General under the Statutes of 1852, (Utah Stats. 1852, 175) disapproved and declared not the decision of the Court.

FILING PAPERS IN RECORDER'S OFFICE—INDORSEMENT OF FILING. Where a statute (Utah Stats. 1855, 176) required a copy of a survey to be filed in the County Recorder's office, and a copy was produced therefrom with an indorsement by the Recorder that it was filed at the proper time, the fact that there was a further indorsement by him that it was recorded, which was not required: *Held*, not to vitiate the filing as required by law nor admit a presumption that it was merely filed for record.

CONSTRUCTION OF STATUTE—EXPRESSIO UNIUS, EXCLUSIO ALTERIUS. The second section of the Statute of 1852 (Utah Stats. 1855, 176) in regard to County Surveyors, required them to keep a record of all surveys made and of all certificates given by them, and especially provided that "no certificate shall be valid unless filed in the Recorder's office, as provided for in this Act": *Held*, that if a certificate was duly filed in the Recorder's office, the omission to do any of the other acts imposed by the section would not invalidate it.

CONSTRUCTION OF STATUTES—CERTIFICATE OF SURVEY. Where a certificate of survey, made under the Statute of 1855, (Utah Stats. 1855, 176) stated that the survey was made for a certain person, naming him: *Held*, that it was a sufficient compliance with the portion of the statute requiring the certificate to certify "to whom given."

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APPEAL from the District Court of the Fourth Judicial District, Lyon County.

This was an action of ejectment, commenced on May 3d, 1867, by Robert Robinson, Willard B. Farwell, and William V. Wells, against the Imperial Silver Mining Company, — Greentree, and — McKay, to recover possession of a rectangular piece of land, two hundred and fifty yards from east to west, and three hundred yards from north to south, on the Carson River, in Lyon County, upon which was situated the Rock Point Quartz Mill, together with the mill and water flowing to it for its use, and twenty-five thousand five hundred dollars damages for the withholding of possession and use of the mill. Subsequently and before the hearing, the action was dismissed as to the defendants Greentree and McKay, and the claim for damages waived. The cause came up first before Judge Hayden of the Fourth Judicial District, but after a short investigation he determined that he was disqualified from trying it, by reason of an interest held by him in certain lots in the town of Dayton, embraced within the limits of the lands claimed by plaintiff; and at his request, S. H. Wright, Judge of the Second Judicial District, occupied the bench when the case again came up. It was tried before a jury in August, 1867, and resulted in a verdict in favor of plaintiffs, for the land, property, and water rights, and costs of suit, upon which judgment was entered. A motion for new trial on behalf of the defendant was overruled, and an appeal was then taken from the judgment and order refusing to grant a new trial.

It appeared that the Imperial Silver Mining Company was a corporation organized under the laws of the State of California, incorporated in 1863, since which time it had been in the possession of the premises sued for; and it was claimed that it had erected improvements on the ground at a cost of over a quarter of a million of dollars.

The record in the case is very voluminous, but all the facts, in addition to the foregoing, necessary for a full understanding of the decision, are stated in the opinion.

Williams & Bixler, for Appellant.

I. The rules of law which must control the action of the Court in

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its decision will be found in *Sankey v. Noyes*, (1 Nev. 68) where it is held that possession when solely relied on should be a *pedis possessio*, an actual occupation, a subjection to the will and control; and in *McFarland v. Culbertson*, (2 Nev. 280) where this Court reiterates the doctrine of *Sankey v. Noyes*, and it is said with approbation that the Courts have repeatedly held that to acquire title by possession to farming, or arable and meadow land, it must be inclosed by a substantial fence. In many cases it has been held that even a fence is not sufficient, but that the claimant must use and occupy the inclosed premises, or some part of them. (See, also, *Wright v. Whitesides*, 15 Cal. 47; *Garrison v. Sampson*, 15 Cal. 93; *Coryell v. Cain*, 16 Cal. 573; *Wolf v. Baldwin*, 19 Cal. 313; *Polack v. McGrath*, 32 Cal. 15; *Woodworth v. Fulton*, 1 Cal. 304; *Murphy v. Wallingford*, 6 Cal. 648; *Preston v. Kehoe*, 15 Cal. 315; *Cummins v. Scott*, 20 Cal. 83; *Hutton v. Shumaker*, 21 Cal. 454.)

From what has been said by this Court, and in other cases cited, it is clear that the least which can be required of one claiming public land by possession against another who has entered thereon, is that he, the claimant, was at the time of the entry in the actual occupation of the premises, using and holding the same and exercising such acts of ownership relative thereto as are usually and ordinarily exercised with reference to such property.

The same acts are not required in every instance, but must be such as are appropriate to the use for which the land was taken; and must, in all cases, amount to an open, notorious exercise of exclusive dominion and assertion of title to the premises. And it is further well settled that when all the facts of a case are before this Court it will determine whether they are sufficient in law to constitute possession. We do not understand *Staininger v. Andrews*, (1 Nev. 59) and *Sharon v. Davidson*, (4 Nev. 416) as holding a different doctrine.

But it is claimed that the entry of Black and Eastman excused Johnson from any further acts necessary to complete his possession, and *Alford v. Dewin* (1 Nev. 207) was cited as sustaining the proposition. The greatest length to which that case can be construed as going is, that when the law requires a series of acts to vest

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title to land, and one who proceeds in good faith to perform such acts is prevented by another from doing any one or all of them, then as against the latter, he will be presumed to have filled the requirements of the law—that is to say, the attempt, in good faith, to perform the act, will be taken for its execution. Such is the law, but we cannot see how that rule is to be extended to this case.

Johnson was not acting under the provisions of any statute upon the subject, but was attempting to acquire title, if at all, under the general rules of law relating to possession, which are about the same throughout the United States when applied to the use of public lands. He had no right to stop and rest upon a few disconnected, uncertain acts which did not give him possession, because others were attempting to acquire title to a part of the land claimed by him under the same rules of law which it is supposed he was acting under, and offer as an excuse for not attempting to perfect his title those attempts of others. If such an excuse for non-action should be allowed by the Courts, then the development and progress of the country would be greatly retarded. No man would dare enter upon land upon which a notice or blazed tree could be found, from an apprehension that he who posted the notice or blazed the tree; or an enterprising grantee of his who dealt in stale titles and *other old wares* might, after the lapse of years, oust him and take his improvements as well as the land.

To perfect title by possession to a given tract of land one must do all in his power to reduce it to his exclusive dominion, and if obstructed in regard to a part of it, he must occupy what he can, and continue to assert in an appropriate manner his claim to the whole. Unless he continues to occupy a relation to the whole tract which would justify his recovery of any part of it against all intruders, he cannot recover any of it, except that which he has the actual possession of, and that possession must be the *possessio pedis*. In other words, before ejectment can be maintained the plaintiffs must show actual or constructive possession of the premises sued for at some time. Actual possession consists in having reduced to his exclusive dominion the particular piece of land; constructive possession in having the dominion of part with a proper assertion of title to the remainder, or attempted and prohibited dominion of it.

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As to DeGroot, it appears that he employed one McMurray to survey for him the land described in his deed from Johnson. McMurray was an employé of Marlette, County Surveyor, and Marlette certified the survey. Williams, a selectman, approved it, and the Recorder of the county placed it on record. Black and Eastman for themselves, and Collins for the Mineral Rapids Company—each claiming possession of parts of the land surveyed—attempted to prevent the survey, and drove DeGroot off. This survey was not an act of possession, or such an act as would give or tend to give title by possession; it was not so intended, but on the contrary, seems to have been an effort to conform to the Utah statutes, and to secure by virtue of those statutes a title for one year. Then if we attach this to all past acts of DeGroot and Johnson, and admit that each act followed its predecessor in due and reasonable time, we find there is yet a complete failure to come within the rules of possession so as to confer title.

If that survey conferred any right whatever, that right commenced with the completion of the survey. We find, however, that Black and Eastman were then in the actual possession of the premises in controversy, and we presume that no one will claim that the Utah statutes intended to give or could give title by a mere survey against one in possession at the time of survey. Black and Eastman were there by consent and license of the Federal Government in which the fee rested, and it was not within the power of the Utah Legislature to confer authority upon another to oust them. If allowed the full force of all that is claimed for it by respondents, the Utah Acts referred to were calculated to work hardships to individuals and greatly retard the progress of the country, for it is said that an unlimited quantity of land could be embraced within a survey, and that no other act was necessary to give title for one year. If such construction may be given to the law, then the Courts ought to be very strict in its application. One claiming by such title should be required to come within both the letter and spirit of the statute. The Utah statutes only attempted to attach the rights claimed by respondents to a survey made by the County Surveyor. This was not made by the County Surveyor, or even by a deputy of his, but by an unsworn, unauthorized citizen, whose

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acts were no more binding upon the Government or its citizens than those of any other private person; and although the statute says that the certificate of the Surveyor "shall be title of possession," yet it is clearly contemplated that an *actual survey* shall first have been made by a competent officer.

The object of requiring an actual survey was that monuments of such a character should be erected or established upon the land as would attract attention and put all persons desiring to occupy it upon inquiry concerning title to the same. If such survey was not required and an actual occupation of the premises was not necessary to acquire title, then the community would have been constantly liable to become unconsciously trespassers.

Again: There is some conflict of authority relating to the power of an officer to appoint a deputy unless thereunto authorized by law; but there certainly can be no question that acts in their nature official performed by one who is neither an officer elected, appointed or commissioned, are void. As DeGroot's survey was not made by an officer recognized by law, we claim that it did not confer any right upon him.

If, however, we admit that the survey was made, certified and recorded as required by law, and that at the time it was made there was no adverse possession by Black and Eastman, respondents still fail to establish a title to the premises sued for. The Utah statutes, under which they claim, required them to fence the land within one year, and declared that a failure to do so should work a forfeiture of all right acquired by the survey. DeGroot and his grantees failed to build the required fence, but they allege as an excuse for their failure, that they were forcibly prevented from doing so by Black, Eastman, and others. This excuse cannot be counted to their credit unless the acts which Black and Eastman prevented would, if completed, have perfected their title.

From the evidence, it appears that the fence which was built, was made by planting posts eight feet apart and nailing to them two boards, each eight inches wide, and that the intention was to make the entire inclosure in the same manner. Let us suppose that they had carried out their intention by building the kind of fence mentioned around the entire tract, would that have given them title

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either under the common law rule of possession or the Utah statutes? The authorities heretofore cited and a fair construction of the Utah statutes clearly justify and require an answer in the negative. A fence of the kind they were building would no more have reduced the land to their exclusive dominion and possession, than the mere planting of stakes or the blazing of trees.

In concluding this branch of the case we call the attention of the Court to the question whether the Utah statutes relative to lands, by virtue of which respondents claim title, furnish the proper rule of decision for this controversy. The Territorial Government of Utah had no power to dispose of the public lands within the Territory, nor to give, grant, or vest any interest therein. The full extent of the power of that Government was to fix the rules which should govern in her Courts in actions between her citizens respecting land or other property. The Utah Legislature could not pass laws affecting the *right* to land, but had the power to declare the *remedies* which should pertain to the same. It could not say that certain acts should confer *title* to land, but had full power to declare the circumstances under which the plaintiff or defendant in a given character of case should *recover* in the Courts of the Territory.

If we are right in holding that the Utah statutes spoken of pertained merely to the *remedy*, then with the repeal or abrogation of those statutes fell the right to claim under them in the Courts of the country. On the twenty-first of March, 1861, the Congress passed the Act organizing the Territory of Nevada. Upon the passage of that Act the statutes of Utah ceased to operate within the limits of the new Territory. As a consequence those attempting to hold lands within Nevada Territory by Utah *survey title* were compelled to enter into actual possession of them or forfeit all claim thereto. The respondents did not take such actual possession and did no act whatever with relation to the land in controversy until their attempt to fence in the fall of that year, making a period of six months, running through the entire farming season, during which they failed to assert title to or enter upon the premises; hence if they ever had any right to it they lost it then.

II. The usual mode of appropriating water is by notice, followed by laying out a ditch or canal, and within a reasonable time there-

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after constructing such ditch or canal and diverting the water into it. If it is desired to build a mill in connection with the ditch, the usual custom is to indicate by notice, or monuments, or stakes, the site of the mill. In December, 1859, Black and Eastman located the ditch and mill site now owned and occupied by appellant, by posting notices at the head of the ditch and the mill site. They surveyed out their ditch and piled up stones as monuments at the mill site, to indicate the location of their mill, and soon after commenced the construction of their ditch. They pursued the work far enough during the season of 1860 to divert the water of the river, and the following season completed the entire undertaking and commenced operating their mill. Having regularly followed one act by another within a reasonable time, until the completion of the ditch and mill, their rights related back to the first act, and hence their title dates in December of 1859, and it must be held good against all claims attempted to be *secured* subsequent to that date. We have heretofore shown that at the time named Johnson had not even the shadow of a title.

Again: The Mineral Rapids Company located the same land in February of 1860, for a town site. They leased a part of it to be actually occupied by one of the company, and laid the entire tract off into town lots, streets, etc., and staked and mapped the whole in the usual and ordinary mode of laying off towns. We submit that as they occupied the land in the appropriate manner of occupying lands for such purposes, they acquired title to the whole town site except that portion of it then in the actual possession of Black and Eastman, whose better right they acknowledged. As against Johnson the Mineral Rapids Company had the better title, and we have succeeded to all they had. So far as the water right goes, there can be no question but that the Mineral Rapids Company acquired a perfect title, or as perfect as possession could make it.

III. The second instruction was wrong. It is subject to the objection that no qualification was made in favor of those in the adverse possession of the land surveyed, at the time of survey. The jury were left to conclude, and, by the import of the instruction, given to understand, that a survey made, certified, and recorded, as required by the Utah laws, gave title for one year against all

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persons without regard to the time, manner, or circumstances of their entry. That there was some peculiar efficacy about a survey and observance of Utah laws and customs which gave a sanctity to a right claimed under them, above and superior to one obtained in any other manner; that the effect was to do away with all previous efforts to secure title to the tract thus honored. As we claimed by possession taken previous to and existing at the time of DeGroot's survey, the Court ought to have qualified this instruction by declaring that such a survey could not operate to give title as against one who had previously located the surveyed land and was then in its actual occupancy.

IV. The Court gave the third and fourth instructions offered by respondents, and refused the seventh, asked by appellant, upon the theory that a foreign corporation is not entitled to the benefit of our Statute of Limitations. Whether the action of the District Court upon this subject was correct or not is a matter of serious debate. Mr. Justice Beatty, in *Chollar-Potosi Company v. Kennedy*, (3 Nev. 361) made a strong argument on our side of the question. We do not believe that a foreign corporation can plead the statute in personal actions, but after careful consideration are disposed to agree with Judge Beatty in reference to the application of section twenty-one to actions concerning real estate. There are strong reasons why the exception embraced in that section should apply to personal claims, but none for its application to actions pertaining to realty.

A judgment for a personal demand should be based upon personal service of summons that it may be made available beyond the limits of the State, while *substituted* service is as effectual as actual service in actions for the recovery of real property. Why then make the *mode* of service rather than the relation of the parties to the property in real actions control the *time* of their commencement? Judge Beatty also suggests, correctly, that ejectment may be maintained against any one in possession, whether master or servant. He might have added that it can only be maintained against the party in possession.

Now, then, we are told that a foreign corporation cannot exist beyond the limits of the State within which it is created, and there-

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fore can never be within this State, or, in the language of the Limitation Act, is "always absent from the State." If the proposition be true, then how can such a corporation eject a party, and actually possess the land entered upon? It seems to us that respondents' argument cuts both ways, and that they must either admit the appellant *in the State*, and therefore in possession of the premises they sued for, or else out of the State, and therefore incapable of ejecting them. If the first, the Act of Limitations applies, or if the second, the complaint does not state a cause of action.

Mesick & Seely, for Respondents.

I. We claim that upon the whole evidence *the verdict is right*. The jury decided the case after a patient and protracted hearing of a great mass of testimony, oral and documentary, which, in many of its features, was conflicting, and some of which, by reason of such conflicts, had to be qualified or entirely disregarded. This Court will not disturb that verdict, except on manifest error shown affirmatively by the appellant, and but for which the verdict should have been for the appellant. If the verdict appears right upon the whole case, it will not be disturbed on appeal.

We assume the privilege of basing our right upon any fact within the record sufficient to support it, and we especially rely upon the certificate of survey of the County Surveyor of Carson County to DeGroot, our grantor, dated November 5th, 1860, upon a survey made October 30th and 31st, 1860, which covers the land in question in this suit. At the time this survey was made and certificate given, the statutes of Utah (Utah Stats. 1855, 175) provided that the County Surveyor should give a certificate of such survey to the person for whom it was made, describing the tract, block, or lot, and number of acres contained; and such certificate should be "title of possession to the person or persons holding the same." The Utah statutes further provided (Utah Stats. 1855, 271) that the Recorder should not record any land to any person until a certificate of the survey had been procured that such land had been surveyed, and such certificate of survey had been approved and countersigned by one or more of the Selectmen of the county, and that "one year shall be allowed to persons having land surveyed to inclose

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and fence said land.” And in *Alford v. Dewin*, (1 Nev. 207) this Court gave force and effect to these Utah statutes, and established the right of recovery under the certificate directed by these statutes to be given. See also *Desmond v. Stone*, (1 Nev. 378) to the same effect. There was a substantial compliance on the part of DeGroot with the Utah statutes as to all acts to be done for the acquisition of the right of possession and transfers of interest. The legal effect of the certificate was to endow DeGroot with the title of possession—that is, the possessory right or title—for the period of one year, without any act being done on his part. Black and Eastman, from whom appellant derives its right, took possession of the land in controversy and ousted DeGroot within the year after the survey; and afterward, in August, 1861, when the then owners of the DeGroot interest undertook to inclose and fence the land, they were forcibly prevented by Black and Eastman and the Imperial Silver Mining Company.

This ouster of DeGroot and the prevention of the fencing of the land, caused by Black and others under whom defendant claims, form a valid excuse for not fencing within the year, and estop the defendant in this controversy from availing itself of the objection that the land was not inclosed within that period. (*Alford v. Dewin*, 1 Nev. 207.) And ever since that time DeGroot and his successors in interest have been kept out of the possession of the land by defendant and those under whom it claims. This would, upon the merits of the case, seem to justify the verdict beyond all question.

II. The law does not say that the survey must be made by the Surveyor in person, nor how it shall be made. (*Alford v. Dewin*, 1 Nev. 207.) But this certificate is itself evidence of the facts which the law directs the Surveyor to certify.

The testimony of Marlette shows that though *he* did not make the surveys, they were made by his order and direction and by his assistant; and upon such acts as his own he issued the certificate. The manual labor, within no rule, was required to be done by him. He had a right to act by agents and employés—everything being done in his name and by his direction, and he adopting—and being responsible for such acts as his own, done in the performance of

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his official duties. The law directs certain records to be made, and copies to be given by certain officers. May they not have the writing done by any employé, without invalidating the official act in which the writing is used? The objection under consideration, if allowed, would upset four-fifths of all official acts performed. This certificate, like a patent, imports verity, and is binding on third parties.

III. As to the next objection it is sufficient answer to say, that the laws of Utah were the laws of the United States as much so as if they had been made by Congress itself, or by Commissioners appointed by Congress; and that, upon the plainest principles, the organization of the territorial government of Nevada did not put an end to either remedies or rights given by the Utah statutes. But this permission to occupy public land, and prohibition against intrusion, decreed by the statute, was a right—not in the land, but over it—subordinate certainly, and only subordinate, to the will and subsequent acts of the Government of the United States, or of some other territorial government which Congress might depute over the same territorial area.

The Courts of Nevada Territory always recognized and enforced the Utah laws, until changed by territorial legislation or congressional action, and upheld rights and redressed wrongs thereunder.

IV. As to the next objection the Court, in the case of *Alford v. Dewin*, has made answer for us: "That before the expiration of the year, the defendants [or its grantors] had entered," and that "the plaintiffs [or their grantors] being wrongfully ousted, could not fence." It does not lie in the mouth of Black, or of defendant, to say that if the plaintiffs had not been prevented they would not have made a sufficient fence. So far as defendant is concerned, plaintiffs were not bound to fence at all under the circumstances: their right was good without any fence; and it would seem strange, if an effort to make a fence of any kind about the premises could place them in any worse position.

Again: There could not have been and there was no evidence that a sufficient fence would not have been built within the year, but for the interference proven.

V. As to the objection that Black and Eastman were in actual

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possession of the property when the survey was made, it is plain that their acts and those of the Mineral Rapids Co., done within the same period of time, constituted no possession, and also left the property vacant at the time of the survey, and open and susceptible to appropriation by the survey and certificate to DeGroot, made under the Utah statutes.

If the acts of Black and Eastman and the Mineral Rapids Co., done before the survey, were sufficient to give them a right to the property, and the property was therefore not vacant, then so were the acts done by Johnson and DeGroot; and the latter took precedence of the former, because the location of Johnson, to which the acts of himself and DeGroot related, were first in time; and Black and Eastman, and the Mineral Rapids Co., and the Imperial Co., had knowledge of such priority. But if the acts of neither were sufficient to possess the property, then the same was vacant when the survey was made, and the title of possession, or the possessory title thereto, was conferred upon DeGroot by the certificate of survey. (*Sankey v. Noyes*, 1 Nev. 68; *Ophir Silv. Min. Co. v. Carpenter*, 4 Nev. 534; *Staininger v. Andrews*, 4 Nev. 59; *Sharon v. Davidson*, 4 Nev. 416.)

VI. If the certificate of survey to DeGroot, which is the foundation of our right was valid, the verdict was correct and could not have been different, notwithstanding all acts antecedent to the survey and rulings and instructions of the Court in reference thereto. Even if such acts were irrelevant or incompetent to sustain a right of recovery, and if the rulings of the Court in relation thereto were erroneous—still, upon the certificate alone and the undisputed evidence having relation thereto, the right of the plaintiffs was perfect, and the verdict could not have been for the defendant.

When the Court can see from the whole record that the verdict is right, it will not be disturbed, notwithstanding the existence of errors which, being corrected, the verdict would remain the same. (*Terry v. Sickles*, 13 Cal. 429; *Clark v. Lockwood*, 21 Cal. 220; *Belmont v. Coleman*, 1 Bosw. 188; *Kelly v. Hammer*, 18 Conn. 311; 1 Grah. & W. on New Trials, 301; 2 Grah. & W. on New Trials, 634; 3 Grah. & W. on New Trials, 968; *Levitaky v. Canning*, 33 Cal. 299.)

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VII. As to the second instruction, the qualification, suggested by appellant, ought not to have been added to it, because the proofs showed that no one was in possession of the land when the survey was made and certificate given. For the same reason the Court properly refused to give defendants' sixth instruction.

VIII. Does section twenty-one of the Statute of Limitations include foreign corporations within its meaning? We insist that this question is settled by the case of *Olcott v. The Tioga Railroad Company*, (20 New York, 210) reversing the case as decided in the Supreme Court of that State, (26 Barb. 148) and overruling the case of *Faulkner v. Delavan & R. C. Co.* (1 Denio, 441). The doctrine settled in the above case by the Court of Appeals of New York, upon great consideration, all the Judges concurring, and after the most elaborate research and argument of eminent counsel, is that: "a foreign corporation sued in this State cannot avail itself of the Statute of Limitations. It is like a natural person, within the exception to the operation of the statute, by which the time of absence from the State is not to be taken as any part of the time for the commencement of an action against it." No one denies that as to natural persons and personal actions, this section twenty-one means as it reads, that is, that under its provisions the aggregate of all a defendant's absence from the State, is to be taken into view in determining the time limited for commencing the action; and that a defendant who pleads the statute, is bound to prove that deducting each interval of his absence, that is, the aggregate of all the absence from the State, he was within the State the full statutory time. That as to personal actions, foreign corporations are within the exception, is fully established by the case above cited, and it is not controverted by counsel for appellant. It being then both decided and admitted that the exception of the section applies alike to all parties to actions, whether they be natural or artificial persons, why does it not likewise apply to every class of actions mentioned in the statute, whether the subject matter of the action be the recovery of money, or of the possession of goods and chattels, or of real property?

It seems to us plain that there is less ground and pretext for holding that actions for real property are not within the meaning of

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—— section, than there is or ever was for holding that foreign corporations are. This is apparent from the language of the section, and its connection with other sections of the statute immediately preceding and following it. The language of all these sections is general, and there is no warrant for applying them to only a portion of the actions mentioned in the statute—there is no room for an equitable construction, or any construction to be put upon them, for the meaning of the words used is not doubtful, and that meaning is in perfect harmony with the apparent purposes and meaning of the balance of the Act.

On petition for rehearing—

Aldrich & DeLong and *Williams & Bixler*, for Appellant, after the first decision, filed a petition for rehearing, in which the principal points urged—and which are, for the sake of convenience, inserted here—were as follows:

I. To ascertain whether the laws of Utah Territory, under which DeGroot claims, are in the nature of a contract, or in their nature remedial, let us suppose that the last one, which requires the inclosure within a year after the survey, had not been passed. In that case the survey, if the laws are in the nature of a contract, would give title of possession, or, in other words, the right of possession, to any person having a survey made, until the disposal of the land by the government of the United States, notwithstanding a new territorial government, embracing the land, had been organized out of a portion of the Territory of Utah, and an independent State government, embracing the same land, had been organized, and the laws of Utah had been by implication of law entirely abolished. No State or Territory can pass any law to impair the obligations of a contract, and if it be said that the organization of these governments was really the act of Congress, on whom no such restraint has been imposed, the answer is, that Congress has not only impaired, but abrogated, the contract, and the parties affected must suffer by the exercise of the power. If the laws then are in the nature of a contract, to use a favorite Mormon expression, the laws of Utah will have been “perpetuated” on the Territory and State of Nevada.

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This continuation of the right claimed in this case cannot be seriously contended for. The fact that by subsequent law the person holding the survey was required to inclose within a year does not at all change the principle which we are attempting to support.

Our positions, then, are that the rights which DeGroot acquired, if any, by his survey, were of that description which depended for their vitality upon statutes in their nature remedial; that these statutes have been repealed by the organization of the Territorial and State governments of Nevada, and by the legislation under these governments; and that these rights and the right of action were lost by the repeal.

II. The survey in evidence was not made and certified according to the laws of Utah. In *Grosetta v. Hunt*, (recently decided by this Court) it is held that there must be a strict compliance with these laws by a person who wishes to avail himself of the benefits of a survey made under them. These laws provide that true copies or diagrams shall be made out by the County Surveyor, and that within thirty days after the survey he shall transmit one to the Surveyor-General, one to the County Recorder, and that he shall give a certificate of such survey, describing the tract and number of acres contained, to the person for whom it was made. In *Grosetta v. Hunt*, this Court says: "Here it appears that to give title of possession, three things are to be done after the survey is made: First, one copy of the survey is to be transmitted to the Surveyor-General's office; second, another copy to the Recorder; third, a certificate of such survey to the party for whom the survey is made." It is not shown that any copy of the survey was transmitted to the Surveyor-General's office, or that more than one copy was ever made out, and this copy, as will be shown hereafter, was not filed, except for record, and afterwards withdrawn. The Act of 1852 contemplated the *filing*, not recording, of these certificates. If the law requires a paper to be filed in any one of the public offices, no one is bound to look in the records proper to find it. The record of it is no notice. The Act further requires that the survey and certificate should be recorded in the office of the County Surveyor. There was no proof that DeGroot or his successor in interest ever com-

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plied with this provision of the law, which was undoubtedly intended to afford an additional protection to the public in the appropriation and improvement of the public lands.

Again, the law requires that the certificate should state the number of acres or rods contained in the survey, and to whom given. There is nothing stated in the certificate as to the person to whom it was given. It may be said that this is unimportant, but is it not just as important to the public, as that they should be informed as to whom a deed had been given?

III. The defendant, for the reasons above stated, is a *bona fide* purchaser of the property in dispute, without notice of any claim on the part of DeGroot or his grantees. Admit that DeGroot's survey gave him the "title of possession," to use the words of the law, and that he was prevented from fencing the premises by reason of the opposition of Black and Eastman, how can it affect the present defendant? The object of requiring these surveys to be filed, as declared in *Grosetta v. Hunt*, was to enable persons who desired to locate public lands, by looking at the files, or where required to be recorded, at the records, in any one of the offices designated, to ascertain whether the lands about to be located had been previously appropriated. An examination of the files or records with respect to the claim of DeGroot would have disclosed the fact, if the defendant happened to look in the one office in which there is any trace of this survey, that DeGroot had a survey, but that the time within which that survey would afford him protection had elapsed. The defendant could have had no means of ascertaining from any one of the public offices the existence of any claim on the part of DeGroot.

By the Court, LEWIS, C. J.:

In the month of September, A.D. 1859, one W. R. Johnson entered upon a tract of unoccupied land, lying on the Carson River, in the county of Lyon; erected some kind of a cabin on the premises; placed a notice on a tree on the bank of the river, in which it was stated that he claimed a certain quantity of land, and also the water of the river; and on the twenty-third day of the next month he had a description of his land,

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with a notice that he claimed the same, recorded in the office of the County Recorder. In addition to this he built a temporary dam across the river, within the boundaries of the land thus claimed by him. Shortly after—that is in November or December—he left the premises and went to California, as it was reported, for his family, intending to bring them to this State. In a few weeks after reaching California he wrote to one Holmes, who was living near his claim, requesting him to do some work on it for him, without specifying what he wished done—his object, however, evidently being to have work done to indicate his intention to continue his claim to the land and water privilege.

But the persons from whom the defendant derives title, and who were then making some claim to the premises, being informed of this letter, forbade Holmes doing any work for Johnson—and none was done. Whether Holmes was deterred from complying with Johnson's request by reason of the threats of those persons or not, or whether he ever had any intention of doing anything, is not clearly shown by the record; nor in the view which we take of this very case is it of any consequence. Nothing further appears to have been done by Johnson to perfect his claim thus begun; but what he acquired, if anything, was subsequently conveyed to one DeGroot, who afterwards secured a title to the premises here in dispute, by means of a survey made in accordance with statute. We have concluded to treat the acts of Johnson, and the conveyance by him to DeGroot, as amounting to nothing, and as giving the latter no right whatever—and so to let the plaintiff's title rest entirely upon the acts of DeGroot. Thus, it will not be necessary to refer further to the acts of Johnson, or to determine what rights, if any, he acquired by means of the few acts done by him. He and his title may therefore be finally dismissed from further consideration in this case.

On the third day of December, whilst he was in California, two persons, Black and Eastman, took steps to acquire a water privilege, or a right to divert a certain quantity of water from the Carson River, through a ditch to be dug across the land claimed by Johnson. As one of the titles relied on by the defendants is derived from these two persons, and as their right or title was based entirely

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upon occupation or actual possession, it will be necessary to ascertain whether they had such actual possession or occupation of the premises in dispute, at the time the grantor of the plaintiff entered and secured a title by means of his survey: If the acts done by Black and Eastman, prior to this survey, were such as to give them actual possession of the land here claimed by the plaintiff, then it must be conceded that the defendant has the better title, and is entitled to recover.

The first act done by Black and Eastman was to post a notice on a tree standing on the bank of the river, which was in this language: "Notice is hereby given that we, the undersigned, have this day located a water right, commencing at or near this notice; also a right of way for a ditch of sufficient capacity to carry two thousand inches of water; and the same amount of water—that is, 'two thousand inches,' is claimed to fill a ditch of the aforesaid capacity. Said water to be carried in said ditch to the first rocky bend with high banks, about one-fourth of a mile down the river from this notice. Said water and ditch right was located by the undersigned on the third day of December, A.D. 1859. The undersigned intend to prosecute said work as soon as spring opens." This notice was signed by Black and Eastman. The valuable portion of the premises—that is, the mill site, is situated below the point here specified as the terminus of the contemplated ditch, and where it was in fact terminated—the mill site being at the lower side of the "rocky bend" mentioned in the notice, whilst the ditch terminated at the upper side. It will be observed, that there is nothing said in this notice about a claim to land, except a right of way for a ditch. In accordance with this claim, and the intention expressed in the notice, Black and Eastman immediately commenced to construct the ditch—working, however, only on occasional days upon it, so that up to about the fifteenth of May, A.D. 1860—six months after the notice was posted, and at the time when the last work was done by them—only about fifteen or twenty days' work had been done; Black testifying that all the work done upon the ditch, up to that time, could have been done by one man in five or six days—whilst Eastman testifies that fifteen or twenty days' work had been done upon it. However that may be, nothing was done by them

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but the digging of an irregular ditch, running between the point where the notice was posted and the rocky bend—a point just above the defendant's mill site. As there was nothing in the notice indicating an intention to claim any land for any purpose whatever, so we are perfectly satisfied, from the testimony, that nothing was done at the time towards appropriating any, except the digging of the ditch. Eastman, who was a witness for the defendant, testified that he *thought* they claimed some land; but what quantity, or where it was located, seems to have utterly escaped his recollection. The defendant can hardly expect to derive much advantage from a claim, the locality of which cannot be determined by the locators themselves. But Black and Eastman both testify that they intended at some time or other to build a mill; and that the water was claimed and the ditch dug with that object in view; and it is claimed by defendants that it was the intention to erect the mill upon the site now occupied by it; that a monument of stones was placed by Black and Eastman at that point. The evidence, however, does not show when the stones were placed upon the ground—whether before or after DeGroot's survey, and it cannot be presumed that it was before. Admitting, however, that Black and Eastman intended to claim the premises in dispute, and that the monument of stones was placed there by them prior to DeGroot's claim, still, it cannot be held that a few stones thrown together would give a person actual possession of a tract of land as large as that claimed here, or indeed of any quantity whatever. It must be borne in mind, that the digging of this irregular ditch, of which no use whatever had ever been made, or attempted to be made, and through which no water had ever run, except during the season of high water in the river, and the piling of a few stones together at some distance below the lower end of it, is all that had been done by Black and Eastman, when DeGroot entered and made his claim. And all this, except perhaps throwing up the monument of stones, was done by the middle of May; and everything remained in that condition, with nothing further being done until the twentieth of October, when DeGroot's survey was made. Black and Eastman were not living on the premises, nor had they any definite purpose with respect to the use of the ditch, or as to

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when, if ever, they would make use of it. Eastman says that the object in doing what work was done, was to show that they had a claim; that they intended some time or other to build a mill, and so make use of the ditch. Were these acts—that is, the digging of the ditch and the piling up of the monument of stones, sufficient under the law to give Black and Eastman actual possession of the land here claimed? This question involves the entire merits of the case.

We admit that the argument of counsel for appellant against the validity of Johnson's claim is perfectly satisfactory, but the same argument and the same authorities relied on apply with equal force to the title of Black and Eastman, and to our mind, as completely overthrow and destroy it.

What acts of dominion over public land will, independent of statutory regulations, be sufficient to give a right of possession as against one subsequently entering; or rather, what character of possession of public land is necessary to be shown to enable a claimant relying solely upon possession to recover in ejectment, has perhaps more than any other question received the attention of the Courts of California and this State; and it may be safely said that it has been uniformly held by them that the possession must be an actual occupation, a complete subjugation to the will and control, a *pedis possessio*. The mere assertion of title, the casual or occasional doing of some act upon the premises, or the bare marking of boundaries, have never been held sufficient, after the lapse of a sufficient time to enable the claimant to make such enclosures or improvements as may be necessary to give him actual possession. We held in the case of *Staininger v. Andrews*, (4 Nev. 59) that while a person claiming public land was diligently prosecuting such work as might be necessary to subject it to his dominion or control, he should be deemed in the actual possession as against all persons entering within his marked boundaries and ousting him. Except in such cases, the Courts have uniformly held that nothing but prior actual occupation or possession will be sufficient to authorize a recovery in ejectment, when possession alone is relied on. Thus in *Murphy v. Wallingford*, (6 Cal. 648) it is said: "Possession is presumptive evidence of title, but it must be an actual *bona fide*

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occupation, a *pedis possessio*, a subjection to the will and control, as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership. A mere entry without color of title, accompanied by a survey and marking of boundaries is not sufficient." So in *Garrison v. Sampson*, (15 Cal. 98) Mr. Justice Baldwin speaking for the Court reiterates the rule in this manner: "The land is public land. It was not taken up by the plaintiff under the Possessory Act of this State, nor was it enclosed. There were a house and a corral on it. Of these he may be said to have been in the actual occupancy. But we cannot see from the proof any right of possession to the whole of the quarter section, or even any claim to it. We do not understand that the mere fact that a man enters upon a portion of the public land and builds or occupies a house or corral on a small portion of it, gives him any claim to the whole subdivision, even as against one entering upon it without title." Again, in *Coryell v. Cain*, (16 Cal. 573) it is said: "And with the public lands which are not mineral lands, the title as between citizens of the State, where neither connects himself with the government, is considered as vested in the first possessor and to proceed from him. This possession must be actual and not constructive, and the right it confers must be distinguished from the right given by the Possessory Act of the State. That Act, which applies only to lands occupied for cultivation or grazing, authorizes actions for interference with or injuries to the possession of a claim, not exceeding one hundred and sixty acres in extent, where certain steps are taken for the assertion of the claim and to indicate its boundaries. Parties relying upon the rights conferred by this Act must show a compliance with its provisions. They can thus maintain their action without showing an actual inclosure or actual possession of the whole claim. But when reliance is placed, not upon this Act but upon possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." See, also, the cases referred to in *Stain-*

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inger v. Andrews, ante. Indeed, that the possession, when that alone is relied on, must be actual and complete, is an expression stereotyped in all cases where this question is discussed, and each succeeding case only serves to strengthen and illustrate the rule. This question has been repeatedly submitted to, and considered by this Court, and it seems impossible to define the requirements of the law, or specify with more clearness or precision the elements of a good possessory title than has already been done in the decisions above referred to.

Tested by the rule announced and exemplified in these cases, had Black and Eastman the actual possession of the premises in dispute at the time DeGroot entered? Most certainly they had not. Here was nothing done for a period of eleven months but the digging of an irregular and utterly useless ditch in a boundless waste of unclaimed lands; apparently without a purpose, never used; dug, not with a view to immediate use, but only as the parties themselves testify, to show that they claimed a water privilege, and only diverting water from the river during the season of high water, with nothing but a small monument of stones at some distance from it to indicate an intention to claim any land. In this condition everything remained for a period of five months without a solitary act being done, and probably the parties themselves not having placed foot upon the soil here claimed during that period, when the grantors of the plaintiff entered. The ditch was certainly not dug for the purpose of marking the boundaries to any claim of land, nor to indicate that an appropriation of any was intended by the parties. It was unquestionably dug simply for the purpose of diverting water from the river; where or how it was to be used is not stated in the notice, and it will also be observed that no land, but only a "right of way" for the ditch, is claimed. The land upon each side of the ditch could without the least conflict with the intention of Black and Eastman, as expressed in their notice, have been appropriated by others. This ditch, then, should be considered simply as an act performed for the purpose of appropriating water, and as such was its immediate purpose, it should give the persons digging it no other right. An act by which water alone is appropriated, should not be considered an act for the appropriation of

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land. Land is appropriated by one character of acts, water by another.

It would be as absurd to say that the digging of a ditch is an appropriation of land sufficient for a mill site, as to say that to appropriate a mill site would be an appropriation of water for milling purposes. It would hardly be claimed, if Black and Eastman had simply appropriated a mill site, that they could by such appropriation claim also that they had appropriated such quantity of water as they might need for milling purposes. What good reason is there for claiming that the digging of a ditch for the purpose of diverting water from the river was an appropriation of a mill site? The ditch, if completed within a reasonable time, might have given a right to divert the water as against subsequent claimants—it could give nothing more. This is all that was claimed in the notice, and all that seems to have been attempted to be secured. Admitting, however, all that can be claimed for this ditch, that its immediate purpose was to secure the possession and control of the tract of land here claimed, still it would be impossible, under the decisions, to hold that Black and Eastman were in the actual possession or occupation of it when DeGroot entered. No person going upon the premises could by the most diligent search have ascertained what was claimed. No boundaries were marked, no improvements were to be seen, no use whatever was being made of the land, nor any indication that there was any intention ever to do so. Did a few stones thrown together place these persons in actual possession of a tract of land nine hundred feet in length by seven hundred feet in width? If so, why might they not, by the same monument, claim an indefinite quantity? Their claim was bounded only by their desires or necessities. We can see no more reason why such a monument, with a ditch not on the premises, should give actual possession of a mill site, than of a hundred and sixty acres of land. We conclude that in October, when DeGroot entered, Black and Eastman were not in the actual possession of the premises here claimed, and therefore that the land was vacant and subject to appropriation. But the defendant also relies upon a title acquired from a company called the Mineral Rapids Company, which, it is claimed, located this land in February, A.D. 1860, some months

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prior to the DeGroot survey. This company, however, does not appear to have conveyed any land to the defendant. It claimed the right to use and divert the water of Carson River between certain points, as will be seen by the following notice, which was the foundation of the right here conveyed :

“ Know all men by these presents, That we, the undersigned, claim all the water in Carson River embraced and being within the boundaries hereinafter described, to wit: Commencing at a point three hundred and sixty-four rods north of Keller’s log house in Chinatown, by one hundred and twenty-six rods east; said point being on the north line of a tract of land located and surveyed by J. R. Sears and others; following said river up and embracing all the water in said river to a point known as Logan & Holmes’ Quartz Mill, for the purposes and use of machinery or ditches, or for any other uses which we, the claimants, may choose.”

The deed from the company to the defendant conveys all the water right and privilege located as above. This deed may have conveyed whatever right the Mineral Rapids Company may have acquired to the water of the Carson River, but we are unable to see how it conveyed the premises here in dispute. No land is described, nor does it appear to have been the intention to convey any. It is simply a deed of a water right and nothing more. But should it be conceded that it was the intention to convey this land, that it is included in the deed, then, we answer, the Mineral Rapids Company never acquired any right or possession whatever of it, and hence could convey no title.

It appears that at the time mentioned the company had a private survey made of a tract of land for a town site, which embraced the premises here claimed. But it is admitted that the company, knowing of Black and Eastman’s claim, did not intend to interfere with their rights, nor make any claim adverse to them, and so relinquished all right to that portion of the land claimed in this action. In fact, they never claimed to be in possession of, or have any title to it. The balance of the survey tract was subdivided into lots, but this portion of it was not so plotted on the map, or subdivided as a part of the town site. All the evidence shows that the Mineral Rapids Company made no claim to this tract.

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Not intending to claim it, and having made no improvements thereon, it can hardly be said that any title was acquired. Even if it was intended to make such claim, still the same objection may be urged to its title that is urged against Black and Eastman's, there was no actual possession of it. If it were possible for this company to acquire title to land which it did not intend to claim, still something more than intention was necessary to give it such title, or to place it in the actual possession of it against a subsequent claimant. As this portion of their survey was not subdivided, nor intended as a portion of the town site, it was certainly as necessary to inclose it and to make some use of it, as in any case. Without intending to be understood as holding that that portion of the land which was intended to be taken up for a town site should have been fenced, it was certainly necessary to inclose or make some appropriate improvements upon that portion of the land within the survey which was not intended for a town site. The subdividing, staking off, and sale of lots might possibly be deemed sufficient acts of dominion to constitute actual possession of a town site, but such acts could give possession of nothing beyond the limits of such acts, or the town lots themselves. With respect to the tract of land here claimed nothing was done by the company but to survey the outer lines. It remained in this condition, with no act of ownership exercised over it, from February to the time of DeGroot's entry, a period of about eight months. The survey made by this company, it must be borne in mind, was not in accordance with the Utah statutes, and had none of the elements of an official survey. Whatever may have been its right with respect to the town lots, it is clear beyond all question that the company had not the actual possession or occupation of this land: First, because it never claimed it; and, second, if it did it made no such improvements upon or inclosures of it as to give it the actual possession at the time of DeGroot's entry. The deed from it to the defendant, therefore, conveyed no right to the land here in controversy.

Whilst the land was thus unoccupied, with no visible evidence of any claim being made to it, except an irregular ditch and a small monument of stones, DeGroot, the grantor of the plaintiff, entered upon it, and in compliance with the statute law then in force, had

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it surveyed by the County Surveyor; had the survey recorded, and obtained from the Surveyor a certificate of that fact. The law authorizing such survey, provided that "the County Surveyor shall within thirty days after completing any survey make true copies or diagrams of the same, and transmit the same to the Surveyor-General, and one to the County Recorder, and give a certificate of such survey to the person for whom it was made, describing the tract, block, or lot, and number of acres contained, *and such certificate shall be title of possession in the person or persons holding the same.*" The statute further declared that "one year shall be allowed to persons having land surveyed to inclose and fence the same, and on their failing to inclose said land within one year, their title to said land shall be nullified, and the land be common, and may be surveyed to any person applying for the same." From these two sections, composed with but little regard for the rules of English grammar, it will be seen that a certificate of an official survey was made "title of possession" for one year; that the person having such certificate was to be deemed in possession of the surveyed premises for one year, but not beyond that. After the expiration of the year the land could only be held by means of an inclosure. DeGroot obtained a certificate from the County Surveyor in accordance with this Act on the twenty-first of October, A.D. 1860, and within one year began to fence the land as required by the latter section above quoted. But whilst so engaged he was forcibly stopped by Black and Eastman, and himself and employes driven from the premises. For this reason the fence was never completed. Thus by a compliance with the law, so far as he could or was permitted, DeGroot acquired a title which entitled him to the possession of the land in dispute, as against all persons except the General Government. It is argued, however, against this title that the survey was not actually made by the County Surveyor, but by persons employed by him and acting under his directions. We see no merit in this proposition. It is true, the County Surveyor did not perform the manual labor of making the survey nor could that have been expected of him by the Legislature. It was made under his supervision and direction and he gave the proper certificate which under the statute constituted the title. It was an

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official act in all its essential features. When duties of this kind are required to be performed by an officer it is not expected that the labor is entirely to be performed by him. If it be adopted by the officer as his act, and certified to by him as such, the law is virtually complied with. Another objection made to this DeGroot claim is that although he commenced to fence the land within the year, yet the fence which he commenced to build, even if completed, would not have been sufficient to give him actual possession of the premises. Counsel seem to think that Black and Eastman and the Mineral Rapids Company could have an actual possession, and be deemed in the occupation of the land without any inclosure whatever, or even marking the boundaries, but that the grantor of the plaintiff could not secure such possession even by complete inclosure. We can hardly think that counsel rely upon this point with much confidence in its merit. DeGroot had under the statute, one full year after the survey to inclose his claim. He began in good faith to comply with its requirements, but was forcibly prevented by the grantors of the defendant. It cannot be presumed in favor of those who by violence stopped the fencing, that it would not have been sufficient to answer all purposes. The presumption, if any can be indulged in, is that an inclosure in all respects sufficient would have been completed. If it were admitted that the fence, as it was being built, would not have been sufficient, still how is it to be known that if DeGroot had not been interfered with, he would not before the expiration of the year have made it complete, and of the proper height? The grantors of the defendant having ousted DeGroot before the expiration of the time limited for him to make an inclosure, cannot now be allowed to derive any advantage from his failure to comply with the law in this respect; nor is the defendant who is their grantee in any better position. The law permits no person to profit by his own wrong. So far as this case is concerned, then, the DeGroot title must be considered as good as if he had inclosed his land with a sufficient fence within the time limited by law. (*Alford v. Dewin*, 1 Nev. 207.) He has therefore the better title, and as the plaintiff claims from him we see no reason thus far why he should not recover.

The next question discussed in this case is that raised upon the Statute of Limitations, the defendant pleading an adverse

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possession in itself for over five years. But we are satisfied this defense is entirely unavailing to the defendant, it being a foreign corporation, and hence not entitled to plead the statute. It having no existence within this State, and the Courts not having complete jurisdiction over it, is brought within the provisions of section twenty-one of the statute, which declares: "If, when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State; and if after the cause of action shall have accrued he depart the State, the time of his absence shall not be part of the time limited for the commencement of the action." That foreign corporations, which may never have had a legal existence within the State, are included within exceptions or statutes of this kind, is a question now very firmly settled by the authorities. Thus, in the case of *Olcott v. The Tioga Railroad Company*, (20 New York, 210) the Court of Appeals, upon a very thorough consideration of the question, and full examination of authorities, came to the conclusion that a foreign corporation came within the provisions of a statute similar to ours, and hence could not avail itself of the bar of the statute. The Court concluded the discussion of the question in this language, every word of which is pertinent in this case: "The course of adjudications established by these cases authorizes us, I think, to carry out the obvious intention of the Legislature in the statute before us. We can see no motive which it could have had for discriminating in favor of a foreign corporation, or any indication of an intention so to discriminate. The language of the exception in the first branch of section twenty-seven is not in all respects congruous to the case of a corporation, but there is an incongruity nearly as great in applying the phrase 'returning into this State' to a person who had never resided here; and quite as great in accommodating it to the case of one who had died abroad, and who could not by any possibility return. If the consequence is that a corporation in another State or country cannot enjoy the advantage of our limitation, the same is true of a natural person domiciled abroad, and where circumstances prevent his coming within our jurisdiction. The policy of our law is, that no persons, natural or artificial, who are thus circumstanced,

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can impute laches to their creditors or those claiming to have rights of action against them in not prosecuting them in the foreign jurisdiction where they reside. It was equitable and in accordance with the policy of the law of limitations, that when the reason for excusing the creditor from the use of diligence should cease by the debtor coming into the State, the obligation to use diligence should again attach. In engrafting this policy upon the statute the Legislature made use of general words, which, though adequate to describe a corporation, did not contain any language referring specifically to a debtor who could not by its Constitution pass from one territorial jurisdiction to another."

It is, however, argued here, that even if section twenty-one does include foreign corporations, its provisions have application only to personal actions, that the section has no reference to and does not apply to real actions accruing within this State. It is not claimed, nor indeed can it be, that there is anything in the language of the section to authorize any such construction or limitation of its provisions. The language employed by the Legislature is as broad and comprehensive with respect to the kind of actions to which the section shall apply as need be, and as clearly includes real actions as personal. If it were the intention to restrict its provisions to personal actions, it is reasonable to presume that appropriate language would have been used for that purpose. The Act in which the section is found fixes the time for commencing all kinds of actions, and section twenty-one certainly appears to make an exception to the entire Act. So far as the language of the section is concerned there is no more reason for holding that it applies only to personal actions than that it applies only to real actions. But some weight is given to the position of the section in the Act as favoring this proposition. It seems to us its position rather negatives any such conclusion. It is placed in position with sections that are unquestionably general in their character, evidently applying to all kinds of actions. Thus, section twenty declares, when, within the meaning of the Act, an action shall be deemed commenced so as to take it out of the statute, and unquestionably applies to all actions. Section twenty-two is in express terms made applicable to personal actions, and then section twenty-three is evidently a general sec-

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tion, providing that when a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from the death. The section's position in the Act certainly does not seem to favor the proposition of counsel for appellant.

It is true, in all cases for the recovery of the possession of land, an action might be brought against the agents by whom the possession may be held for the corporation. Such action, however, would be unavailing in determining the title or claim of the real party in interest. But even if it were, that is no reason why the Courts should place a strained and unnatural conclusion upon the plain language of the Legislature. The real claimant—the foreign corporation—is not within the territorial jurisdiction of the Courts of this State, although its agents may be; and this is the real reason why it has been deemed proper to provide, that when a cause of action has accrued against a person, the time of his absence from the State, where the plaintiff resides, shall not be computed in the period of limitation. This precise question was raised and passed upon by the Supreme Court of Indiana, in the case of *Lagow v. Neilson*, (10 Ind. 183) the Court holding that a section, substantially like section twenty-one of our Act, included real as well as personal actions. “It is contended,” say the Court, “that this section was intended to apply to personal actions, and not to those for the recovery of real property. We are not inclined to adopt that construction. As contended, the concluding branch of the section should not be so construed as to allow the law of limitations of a sister State to be used here in regard to actions for the realty; and it may be that for the recovery of real estate, a party is never prevented from bringing his suit by the mere residence of any claimant or owner—still, these conclusions not being inconsistent with the very explicit language used in the first branch of the enactment, cannot be allowed to control it. The phrase ‘shall not be competent in any of the periods of limitation,’ evidently refers to all the periods of limitations definitely fixed by the statute—hence, there seems to be no room left for construction.”

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Chief Justice Boatty, in the case of the *Chollar-Potosi Mining Co. v. Kennedy and Keating*, (3 Nev. 361) took a different view of this question; but that case was not decided upon this question, the Court not agreeing with the learned Judge in the opinion entertained by him—so, that case is not authority except so far as the opinion there expressed is concerned, which is certainly entitled to great weight; but we are compelled, upon a careful consideration of the question, to come to a different conclusion. The defendant could not therefore avail itself of the statute.

It is also argued, that the Court below erred in giving certain instructions at the request of the plaintiff, and in refusing to give others asked by the defendant. The second instruction given by the Court, and which it is claimed is incorrect, is in this language: "Under the laws of the Territory of Utah, in force during the year 1860, the certificate of the County Surveyor, of his survey of land to the person for whom it was made, describing the tract surveyed and number of acres contained, was the title of possession thereto to the person or persons holding the same for the period of one year, without making any improvements upon the land; and such right and title continued without inclosing or fencing, or otherwise improving the same as against any and all persons preventing such fencing and their grantees and successors in interest." The objection urged to this is, that no exception is made of such lands as might be occupied at the time said survey was made; that the title given by reason of such survey could only be of land unoccupied at the time it was made. That a survey could give no title as against persons in the actual possession, when made, may be admitted; but we have shown that neither Black or Eastman, nor the Mineral Rapids Company, were in the actual possession of the land in dispute at the time DeGroot had his survey made; that it was, in fact, vacant land; the failure therefore to incorporate an exception with respect to occupied land, in the instruction, could not possibly have injured the defendant. Hence, the giving of the instruction was not an injury of which it can complain, as such instruction could not have misled the jury to its prejudice. However, we are satisfied that the first instruction given was incorrect; but it is also perfectly evident, that the verdict is correct, and sup-

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ported by the undisputed facts of the case. Had it been against the plaintiff, it would have been clearly contrary to the evidence. Such being the case, it should not be disturbed.

The rule, we think, is well settled, that a verdict which is undoubtedly right upon the evidence—that is, when so clearly right that if it were the other way it would be considered contrary to the evidence—should not be set aside because of the admission of improper evidence, or the giving of incorrect instructions. (1 Grah. & Waterm. on New Trials, 301; 2 Grah. & Waterm. on New Trials, 634; *Levetzky v. Corning*, 33 Cal. 299; *Pico v. Stevens*, 18 Cal. 376; *Fleeson v. Savage Co.*, 3 Nev. 157.)

The judgment of the lower Court is affirmed.

On petition for rehearing—By the Court, LEWIS, C. J. :

The conclusion reached by us in our former opinion in this case was the result of very careful examination of a very voluminous record, and a no less careful examination of the legal principles announced. We are perfectly satisfied that the conclusion thus obtained is correct, upon the questions made by counsel and discussed by the Court.

Other grounds, however, are now taken, and a rehearing is asked principally upon points not made on the original argument, nor considered by the Court; but we have found nothing in the petition to shake our convictions as to the correctness of our former opinion. As we consider it unnecessary to enter into a full discussion of all the points made upon the petition, we will content ourselves with briefly stating our answers to each point as made by the appellant; and, first, it is argued that the Utah statute, which authorized the survey of unoccupied public lands, and declared that the Surveyor's certificate of such survey should "be title of possession to the person or persons holding the same," was simply remedial in its nature, and as it has been repealed no rights can be claimed under it.

To this it is only necessary to say, that the law gave to the certificate, obtained in accordance with the provisions of the law, the character of a title as to all save the General Government. The law having been complied with, and the title obtained under it, the repeal of the law cannot destroy the title so acquired. It became

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a perfect and vested right, so far as the law and DeGroot's compliance with it could make it so before the repeal.

It is next objected, that it was not shown that the County Surveyor made a copy or diagram of the survey, and transmitted it to the Surveyor-General, as required by the law already referred to. The Act, it is true, imposed that duty upon the County Surveyor, but we doubt very much if the failure on the part of that officer to discharge it would deprive the holder of the certificate of the title of possession which it conferred upon him. Whether it would or not that point is not available here, for that objection was not made when the certificate was offered in evidence, and hence should not avail the appellant in this Court, because it may be very well said that the respondent might have been able to show that the copy was regularly filed with the Surveyor-General had the objection been made at the proper time. An objection of this kind which might be removed, if made at the trial, should not nor do the Courts allow it to avail the complaining party who raises it for the first time upon appeal.

Counsel will observe, that whatever may have been said in the case of *Grosetta v. Hunt*, with respect to the necessity of filing a copy of the survey with the Surveyor-General, was not the decision of this Court, as a majority of the Judges did not concur in what was said upon that point. It is also objected that the certificate was not filed with the County Recorder, an omission which by the law itself is made fatal to its validity. To this it may also be answered, the certificate was not objected to in the Court below upon that ground. But we find as a matter of fact that it was regularly filed, as appears by the indorsement upon it: "Filed November 17th, 1860." Signed by the Recorder.

True, the further indorsement is made, that it was recorded, on the twenty-ninth of the same month. This recording of the instrument, which was a useless act, could not certainly vitiate the filing which was made in accordance with the requirements of the law, nor yet is there any evidence in the record to justify the conclusion of counsel that the instrument was simply filed for record. It is not so stated in the file marks, nor is there any other proof tending in that direction. We cannot presume in direct opposition to

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the indorsement on the certificate that it was not filed as the law required.

Again, it is argued, that it does not appear the certificate was recorded in the County Surveyor's office, the law of 1855 seeming to require this to be done by the Surveyor. But, like the other objections to this paper, this is now made for the first time. Yet, there is another answer to it. The same section which requires such record declares expressly that "no certificate shall be valid unless *filed in the Recorder's office*, as provided for in this Act." It must be presumed by all rules of construction that the omission to do any of the other acts imposed by the section would not render the certificate void. To expressly make it invalid if one of several acts required to be done was omitted, authorizes the presumption that it was not the intention of the Legislature to invalidate it if any of the others were neglected to be performed.

The last objection to the certificate is, that it does not state "to whom it was given." This is also a new point; still we find that the certificate does state that the survey was made for DeGroot, which is a sufficient compliance, if indeed a compliance with the law in this particular were at all necessary.

Counsel next enter into a discussion of the evidence and merits of this case, and the instructions given and refused. These were fully considered in our former opinion, and we find nothing in the petition to occasion a change of our views. It is possible that some minor facts were misstated in that opinion, but we find upon a reëxamination that all the material points of evidence were correctly related. It is, therefore, deemed unnecessary to further discuss the fourth point of the petition for rehearing.

Upon the proposition that the defendant acquired a right to the water by prescription, it is sufficient to say that no such defense was made in the answer, nor in any way suggested upon the trial of the case.

The rehearing is denied.

JOHNSON, J., did not participate in the foregoing decisions.

Peck v. Brown.

JOHN S. PECK, RESPONDENT, v. JOHN BROWN *et als.*,
APPELLANTS.

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CORDWOOD AND TIMBER CUT ON PUBLIC LAND. Cordwood and other timber cut into merchantable form before, and remaining on public land at the date of, the issuance of a patent is personal property, and does not pass with the land to the patentee.

REMOVAL OF WOOD CUT ON PUBLIC LAND BEFORE PATENT. Where Peck, being the patentee of certain public land, procured an injunction to restrain Brown and others from cutting growing trees, and also from removing certain cordwood and other timber cut before the issuance of the patent and still remaining on the land: *Held*, that the injunction should be so modified as to allow the cordwood and cut timber to be removed.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The land referred to in the opinion was the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section sixteen, in township seventeen north, range nineteen east, in Washoe County. The wood remaining on the land, and to restrain the removal of which the injunction was granted, was alleged to consist of one hundred cords, worth three dollars per cord.

Robert M. Clarke, for Appellants.

I. The Court found the defendants in possession of the land and wood, but failed and refused to find the plaintiff the owner of, or entitled to the possession of, the wood. The decree for possession of the land to plaintiff, therefore, erred in enjoining defendants from removing the wood.

Finding the defendants in possession at the time of suit, and refusing to determine them the owners, or otherwise, the Court orders them to deliver the land upon which the wood is situated, denying them the right or opportunity to remove it, and thus puts defendant out of, and the plaintiff into, the possession of the wood.

II. The defendants having been in possession of the land under claim of possessory title, and whilst so in possession having cut the wood from trees growing upon the land, are the owners of it, and

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entitled to the possession of it as against the plaintiff, who acquired the paramount title from the State at a period subsequent to the cutting.

W. L. Knox and *A. C. Ellis*, for Respondent.

I. The record shows no error to the prejudice of defendants, and they have no reason to complain. (*Thompson v. Lyon*, 14 Cal. 42; *Kilburn v. Ritchie*, 2 Cal. 148; *Clayton v. West*, 2 Cal. 382; *Smith v. Brannon*, 13 Cal. 116.)

In the absence of a statement of the testimony, it will be presumed that the Court below acted upon proper evidence, and that the judgment is right, unless errors are disclosed by the pleadings, or in the judgment itself.

II. The patent is conclusive as to plaintiff's title. (*Boggs v. M. M. Co.*, 14 Cal. 362; *Yount v. Howell*, 14 Cal. 467; *Ely v. Frisbie*, 17 Cal. 250.)

III. Plaintiff is entitled to the timber cut by trespassers on his land. (*Kittredge v. Woods*, 3 N. H. 503; *Parsons v. Camp*, 11 Conn. 525; *Brown v. Ware*, 12 Shepl. 411; *Sands v. Pfeiffer*, 10 Cal. 263; *Hallick v. Mixer*, 16 Cal. 575; *Billings v. Hall*, 7 Cal. 7.)

IV. The remedy by injunction was the proper remedy, and the judgment for a perpetual injunction is right. (*Speer v. Cutter*, 5 Barbour, 486; *Hicks v. Michael*, 15 Cal. 116; *Hicks v. Compton*, 18 Cal. 208; *Payne & Dewey v. Treadwell*, 16 Cal. 223.)

By the Court, WHITMAN, J. :

The decree from which this appeal is taken was rendered in an action for the recovery of real property; seeking also an injunction to prevent the cutting of standing timber upon the premises, and the removal of trees already cut and made into cordwood or other merchantable form. The decree granted the entire relief sought. This appeal, though nominally from the whole thereof, is really only from such portion as enjoins the removal of timber cut, as aforesaid.

It is true, as urged by respondent, there is no assignment of errors, or proper statement in the transcript; what is offered as a statement, lacks its vital and essential ingredient; there is no recital

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of the grounds upon which the parties rely for relief, but the judgment-roll presents all that is necessary for the decision of the point urged by appellants. The District Court finds that they were in possession at the date of suit, and had so been for some time there before, and had then cut the timber aforesaid; that respondent had no title to the described premises until the tenth day of July, 1868, when he acquired a patent by purchase from the State; that the "greater part" of the acts of appellants were done prior to such date. What acts were subsequently done is not found, and as no subdivision is made, the case stands here as if all were done before that time. Unless the right to the timber cut passed to respondent by his patent, he had none; and it could only pass as of a fixture on, or appurtenance to, the realty; but timber felled by act of man, or wood cut, is personal property. Some of the decided cases go a great length in passing with the freehold what abstractly would be held personalty; perhaps none has further extended the rule, or its application, than *Farrar v. Stackpole*, (6 Maine 155) and *Kittridge v. Woods*, (3 N. H. 503). In the first of these cases, it was held that a mill-chain, dogs, and bars in their appropriate places when the deed was made, the chain attached by a hook to a piece of draft chain, which was fastened to the shaft by a spike, passed under a deed conveying a saw mill with the privileges and appurtenances. This decision was based upon the principle, "that certain things, personal in their nature, when fitted and prepared to be used with real estate, change their character and appertain to the realty as an incident or accessory to its principal." In the second case cited under the same rule, it was held that certain heaps of manure passed by deed for the land, as appurtenant, being intended to be used upon it, and for its benefit. In the present case the timber and wood were cut expressly to be taken from the premises, and the rule of decision quoted has no application. (*Walker v. Sherman*, 2 Wend. 638; *Cook v. Whitney*, 16 Ill. 481; *Wincher v. Shembury*, 2 Scam. R. 283.) This last case is precisely in point upon the facts, so far as respondent's claim is concerned. Shembury had obtained a certificate of purchase to certain government land, upon which prior to its date, Wincher had cut certain rails and sawed timber.

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After acquiring his certificate, S. prohibited W. from removing the rails or timber, and took them away himself. W. brought action to recover the value, and the Court held that he could maintain the same as against Shembury, saying: "A certificate of purchase or patent vests in the patentee a title to the land, and generally all that is growing on, or is in the contemplation of law attached to the land—as houses, fences, growing timber, grains, etc.; and it is said fallen timber passes with the land. But that which has been severed from the land, and by the art and labor of man converted into personal property, such as implements of husbandry, barrels, furniture, or even rails when not put into a fence, or evidently intended to be so used upon the land, (which could not be inferred if made by a stranger) do not pass with it, any more than the grain, grass, or fruit which has grown upon, and been gathered from it." Respondent having then no title to the timber and wood cut, had no right to an injunction to restrain appellants from removing the same. (Whether under any state of facts such relief would be proper is not here decided.) The District Court erred in granting such relief; the decree, correct in other respects, must be modified in this, and the cause is remanded, with direction to strike from the decree all that portion restraining appellants from removing the timber or wood cut prior to the tenth day of July, A.D. 1868.

JOHNSON, J., did not participate in the foregoing decision.

**MICHAEL HILGER, APPELLANT, v. THOMAS J. EDWARDS,
RESPONDENT.**

CONTRACT TO CUT CORDWOOD—RIGHT OF PROPERTY. Hilger, having purchased certain standing timber, contracted with Gibbons to cut it into cordwood and deliver it at a certain place by a certain time, for which Hilger was to pay a certain price per cord, three-fourths of the payment thereof as fast as delivered, and the balance when all delivered; it being also agreed that if payment was not made on delivery, or within ten days afterwards, Gibbons was to be the owner of the wood; and, further, that he should have a lien upon it for his pay. After Gibbons had cut the wood it was attached as his property, and

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none of it was delivered as stipulated in the contract: *Held*, that wood could not be held on attachment against Gibbons as his property.

FORFEITURE OF RIGHTS AND LIEN UNDER CONTRACT BY NONCOMPLIANCE. Where a person contracted to cut down the timber of another, and deliver the same by a certain time at a certain place, for a certain price to be then paid, and was to have a lien upon the wood for the stipulated payments, and he failed to deliver by the time specified, though as he cut the wood, all his labor was worth: *Held*, that he had forfeited all right under the contract, and had no right of lien.

RIGHT OF PRESENT POSSESSION TO MAINTAIN REPLEVIN. In an action for the recovery of specific personal property, it is necessary for the plaintiff to show that he is entitled to the immediate possession.

EXCUSES FOR NONPERFORMANCE OF CONTRACT. Where a person contracted to deliver certain personal property by a specified time, and was prevented by its seizure under an attachment issued against him by a third person: *Held*, that legal difficulties of that kind constituted no excuse for a violation of his obligations under the contract.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action of replevin for the cordwood referred to in the opinion. Upon giving the proper undertaking, and due appointment of an Elisor, the property was taken out of the possession of the defendant and delivered over to the plaintiff. The writ of attachment against Spencer Gibbons, under which the defendant as Sheriff justified, was issued in a suit brought against him in the District Court, for the recovery of seven hundred and fifty dollars, by John E. Cheney. The judgment in favor of defendant, from which and the order overruling plaintiff's motion for new trial this appeal was taken, was for the return of the property, and in default thereof, for the sum of fourteen hundred dollars.

A. C. Ellis, for Appellant.

[No brief on file.]

R. M. Clarke, for Respondent.

I. To recover in this action, plaintiff must establish in himself either general or special property, and right of immediate possession; and unless the action could be maintained against Gibbons it cannot be against Edwards.

II. The growing timber was part of the realty, and as such the

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property of Osterday ; Gibbons severed it, changed it from real to personal property, and reduced it to his own possession, which possession he held at the time of the attachment. Hilger never possessed it.

III. The wood was to be delivered at Harrup & Chamberlain's flume by November 15th, and to Hilger by December 1st, 1868. The attachment having been levied on November 11th, the performance of this condition was made impossible by the act of the law and excuses of Gibbons.

IV. Gibbons was to hold the wood until payment made, and payment was not to be fully made until December 1st, 1868. This action was brought November 16th, 1868, without payment or tender of price for cutting ; and as without such payment or tender there could be no right of possession in plaintiff he must fail in the action.

V. The contract contains no terms of forfeiture against Gibbons. A proceeding by Hilger against him to recover possession of the wood must have proceeded, if at all, upon the theory that the contract was broken, and therefore a nullity ; for Hilger could not have enforced it as to his side and disregard it as to Gibbons. He could not have taken the wood without paying for it.

By the Court, LEWIS, C. J. :

Upon a writ of attachment issued from the District Court of the Second District, against one Spencer Gibbons, on the eleventh day of November, A.D. 1868, the defendant, who was then the Sheriff of the County of Ormsby, seized and took into his possession about six hundred cords of cordwood, which is claimed by the plaintiff, and sought to be recovered in this action. The main issue in the case is upon the title and the right to possession of the wood, the defendant contending that the right of possession is in Gibbons, whilst the plaintiff claims that he is the owner and entitled to its possession. The facts out of which this conflict of right arises may be thus briefly stated : Hilger, on the sixth day of March, A.D. 1868, purchased of one Henry Osterday all the standing timber on a certain tract of land in the County of Ormsby, at a stipulated sum per cord. A few months afterwards he entered into an agree-

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ment with Spencer Gibbons, the defendant in the attachment suit, whereby it was agreed between them that Gibbons should "cut and deliver to the party of the second part (Hilger) six hundred cords of good merchantable cordwood, or all the wood that the timber now standing, or being on what is known as "Dutch Henry's timber ranch, will make. * * * Said wood to be corded and delivered at or near the mouth or lower end of what is known as Har-rupps' and Chamberlain's Flume. * * * All of said wood to be delivered as aforesaid on or before the fifteenth day of November, A.D. 1868. The party of the second part agrees to procure, furnish, and pay for all the timber upon said ranch; and further, to pay to the party of the first part the sum of three dollars and sixty-two and one-half cents per cord in coin for all the said wood corded and delivered as aforesaid, except one hundred cords, for which he agrees to pay three dollars and seventy-five cents in coin per cord, payment to be made as follows: Three-fourths of the amount of the value of the wood to be paid as fast as delivered as aforesaid, and all to be paid as soon as this agreement is fully complied with and all the wood delivered as aforesaid. And it is further understood by and between the parties, that in case the party of the second part fails or neglects to make the payments as aforesaid, or within ten days thereafter, the said party of the first part is to be the owner of all the wood corded and delivered as aforesaid; and the said party of the first part is to have a lien upon all the wood corded and delivered until he is fully paid for delivering the same." Then follows this clause: "It is understood the payment as above stated is not to be made until the seventh day of November, A.D. 1868, when three-fourths of the wood then corded and delivered as aforesaid shall be paid for, and all to be paid when all shall be delivered; that is, on the first day of December next."

Whatever right or claim Gibbons had to this wood, if he had any, was acquired under this agreement. And it is quite certain that the only right which he had at the time it was seized upon the attachment against him was a mere lien, or right to retain the possession as security for the performance of the contract by Hilger.) It is claimed by counsel for defendant that Gibbons was the ab-

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solute owner of the wood cut by him. There are certainly no words of sale in this agreement; nor is there anything in it indicating an intention to transfer the ownership from Hilger, but on the contrary we find stipulations in it utterly inconsistent with the ownership being in Gibbons. Thus it is provided that he shall have a lien upon the wood until the payment of the stipulated payments by Hilger. It is hardly to be presumed that he would have claimed a lien upon his own property. Again, it is provided that he shall be the owner of the wood, if the price were not paid by Hilger within ten days after its delivery. Why such provision if Gibbons were the owner before such failure? Indeed, there is not a word in this entire instrument indicating an intention to transfer the title to the wood to Gibbons, until the failure by Hilger to make the payments according to agreement. At the time the wood was seized none of it had been delivered, hence there could have been no forfeiture of Hilger's title. He was then at that time the owner of the property, and Gibbons could have had no right except that of a lien upon it, in accordance with the agreement. If the agreement were in force at the time this action was brought, that is, if Hilger were bound by it, and the lien continued, the right of possession would in that case be in Gibbons, and it is possible this action could not be maintained, as it is necessary that the plaintiff, in an action for the recovery of personal property, show that he is entitled to the immediate possession. But it is proven in this case that Gibbons had failed to comply with his contract, he not having delivered any of the wood on the sixteenth of November when this action was brought; whereas, it was made his duty to deliver the whole of it on the fifteenth. Here was a breach of the agreement on Gibbons' part, and Hilger had the right to abandon it entirely. Under a contract so broken Gibbons could at best have no right, except that of a claim for a reasonable compensation for the work done by him. He could not claim the right to deliver the wood after the day specified in the contract, except by the consent of Hilger and a waiver of the breach.. By the failure to deliver the wood on the fifteenth Gibbons forfeited all rights under the contract; and as he had been paid the full value of the work done by him prior to that time, he could claim no lien upon

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the wood. He could not hold possession of what had been cut in expectation of the future fulfillment of his contract, for he had violated it; nor for work already done, because for that he had been fully paid, Hilger testifying that he had paid its full value.

It is argued, however, that by the latter clause of the agreement Gibbons had until the first day of December to deliver the wood to Hilger. We do not so interpret the instrument; at least it is clear all the wood was to be delivered at the end of the Chamberlain flume by the fifteenth of November, and as it is conceded that was not done, the contract in that particular was therefore violated. But taking the whole agreement together, we are satisfied that the wood was to be delivered to Hilger on the fifteenth of November, and the last clause was not intended to extend that time but only extend the time of the final payment to be made by Hilger. However, as the wood was not delivered at the flume at the specified time, there was a breach of the contract, and Hilger had the right to abandon it, and Gibbons could claim no further rights under it. Had this action been brought against Gibbons he could not avail himself of the right to hold the wood under an agreement which he had not fulfilled on his part; and it is conceded that the defendant stands in no better position than Gibbons would were he the defendant. The seizure of the wood upon the attachment on the eleventh day of November, can certainly constitute no valid excuse for the failure to deliver it in accordance with the contract. Gibbons, it is true, may thereby have been prevented from fulfilling his agreement in that respect, but that should not be allowed to affect the plaintiff's rights. We know of no rule of law which makes legal difficulties of this kind an excuse for a violation of obligations to others. We conclude, then, that Hilger is the owner of the wood, and as Gibbons had failed to fulfill his agreement, he forfeited all rights under it; and as he has received full payment for what wood has been cut by him, he can have no lien or claim upon it; and the defendant claiming from him has no better right. Hilger is therefore entitled to the possession.

Judgment reversed and cause remanded.

JOHNSON, J., did not participate in the foregoing decision.

 Little v. Currie.

JOHN LITTLE, RESPONDENT, v. J. C. CURRIE, APPELLANT.

NO PRESUMPTION IN FAVOR OF JURISDICTION OF JUSTICES OF THE PEACE. Nothing can be presumed in favor of the jurisdiction of a Justice of the Peace, but each step towards its acquirement must be affirmatively shown.

AFFIDAVIT FOR PUBLICATION OF SUMMONS. To obtain a legal service by publication of a summons against a non-resident, it must appear by affidavit, not only that the defendant is a non-resident, but also that a cause of action exists against him; and a judgment procured in such a case before a Justice of the Peace, when the latter fact does not appear by affidavit, is void.

ORDER FOR PUBLICATION OF SUMMONS. An order for publication of summons, which fails to state any fact upon which it is founded, is fatally defective.

ORDER FOR PUBLICATION BEFORE ISSUANCE OF SUMMONS PREMATURE. Where an order, made by a Justice of the Peace upon the filing of an affidavit for publication of summons, directed that "summons be issued in this case as above entitled and be published, etc.": *Held*, that the direction for a summons to issue was not the office of such an order, and that if the summons did not already exist the order was premature.

STATUTORY PROVISIONS FOR OTHER THAN PERSONAL SERVICE. Statutory provisions for acquiring jurisdiction over a defendant by any other than personal service must be strictly pursued.

JUDGMENT VOID FOR WANT OF JURISDICTION. A judgment by a Justice of the Peace against a non-resident, where the affidavit or order of publication is insufficient and there is no personal service nor any appearance, is absolutely void.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action of ejectment for a lot of land in Virginia City. The facts are stated in the opinion.

R. H. Taylor, for Appellant.

F. W. Cole, for Respondent, on the point that the affidavit for publication of summons was insufficient, cited *Ricketson v. Richardson*, (26 Cal. 149); *Forbes v. Hyde*, (31 Cal. 342) and *Pollard v. Wegener*, (10 Wis. 574); and on the point that an order of publication made in advance of the issuance of summons was a nullity, he cited *People v. Huber*, (20 Cal. 81).'

By the Court, **WHITMAN, J.:**

Upon the trial of this cause, (an action for the recovery of real

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8*	832
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22	184
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property) in the District Court, the defense was based upon a claim of title under execution and sale against respondent, which were had upon judgments ordered in a Justice's Court, in the cases of *Pinkerton v. Little* and *Cornwall v. Little*. The proceedings were the same in each case. The District Judge, against the objection of respondent, admitted in evidence the Justice's docket and accompanying papers, reserving his decision as to their validity and effect. Subsequently he decided that the Justice acquired no jurisdiction and that his actions were void. Judgment was given for respondent, from which and an order refusing a new trial, this appeal is taken, presenting the single question of error in the decision aforesaid.

By affidavit, order, and publication of summons, under the provisions of the Statutes of 1866, it was attempted to obtain service upon Little. The affidavit is as follows:

“ STATE OF NEVADA,
County of Storey, Virginia Township No. 2. }

“ A. CORNWALL }
v. }
JOHN LITTLE. }

“ Now comes plaintiff, A. Cornwall, and after being duly sworn, deposes and says: That he is the above named plaintiff; that he commenced the above entitled action on the fifth day of June, A.D. 1866, in the above named Court, to recover the sum of one hundred and thirty dollars. That he has a good cause of action against said defendant John Little, and that no part of the said sum of one hundred and thirty dollars has been paid. That said defendant, John Little, resides outside of the State of Nevada, to wit, in Meadow Lake City, Nevada County, State of California.” * *

Upon the question of jurisdiction in the Courts of Justices of the Peace, nothing can be presumed in their favor; each step toward its acquirement must be affirmatively shown. To warrant an order for the publication of a summons, one of certain facts must exist, either that “ the person upon whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself

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to avoid the service of summons"; and such fact must "appear by affidavit to the satisfaction of the Justice," conjoined with the fact that "a cause of action exists against the defendant." The affidavit in this case is sufficient on the one point, but not on the other; it states the fact of non-residence clearly, as it shows affirmatively the actual residence of Little in the State of California; but it states no fact from which it appears that a cause of action exists against him; it draws a legal conclusion, offering nothing from which the mind of the Justice could be informed, or upon which he could base a decision. Such a statement has been uniformly held bad. (*Ricketson v. Richardson*, 26 Cal. 153; *Forbes v. Hyde*, 31 Cal. 353.)

Upon this affidavit an order was issued reading thus: "Upon reading the foregoing affidavit, and good reasons appearing to me for so doing, it is ordered that summons be issued in the case as above entitled, and be published." * * This order fails to state any fact upon which it is founded; such failure has been held fatal. (*Ricketson v. Richardson*, 26 Cal. 149.) It also directs a summons to issue. This is not its office; the order should be that "service be made by the publication of the summons." Suit is commenced before the Justice by the "filing a copy of the note, etc., and the issuance of a summons thereon." The order is a direction of extraordinary manner of service, and presupposes the existence of a summons; otherwise it is premature. (*People v. Huber*, 20 Cal. 81.)

Further objections are made to the summons, to time of entering judgment, etc., but it is unnecessary to pursue this investigation. Statutory provisions for acquiring jurisdiction by any other than personal service must be strictly pursued. (*Jordan et al. v. Giblin et al.*, 12 Cal. 100; *Bayley v. Freeman*, 30 Cal. 610; *Forbes v. Hyde*, 31 Cal. 342; *People v. Huber*, 20 Cal. 81; *Pollard v. Wegener*, 13 Wis. 574; *Paul et al. v. Armstrong*, 1 Nev. 82.) Such course was not followed, but seems to have been studiously avoided in the actions of Pinkerton and Cornwall against Little.

No foundation for jurisdiction having been laid, none was obtained, and any and all proceedings subsequent to the affidavit and order recited were absolutely void; no valid judgment could have

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been rendered except upon the personal appearance or submission of Little. The record shows that he never appeared, nor in any manner submitted himself to the jurisdiction of the Court.

The order and judgment of the District Court are correct, and are affirmed.

Z. B. TINKUM *et al.*, RESPONDENTS, v. WILLIAM T. O'NEALE, APPELLANT.

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JOINT DEBTOR DEFENDANT DECLARED A BANKRUPT—CONTINUANCE. Where, in a suit against partners on a joint claim against them, it appeared that one had been declared a bankrupt, but had not yet received his discharge, and the case was continued as to him: *Held*, on a motion for a continuance as to the other partner, that the trial could not proceed against him until a disposition of the bankrupt proceedings of his copartner.

PARTNERSHIP CONTRACTS JOINT. Partnership obligations are joint in their nature at least to the extent that one partner may always take advantage of the non-joinder of his copartner in an action on a partnership contract.

JUDGMENT AGAINST ONE PARTNER BARS ACTION AGAINST HIS COPARTNER. A judgment against one partner upon a partnership contract merges the debt and constitutes a bar to a subsequent action for the same breach against his copartners.

ACTION AGAINST PARTNER WHERE COPARTNER DISCHARGED IN BANKRUPTCY. Where one of two partners is discharged in bankruptcy, the other may be proceeded against alone.

SUSPENSION OF LEGAL PROCEEDINGS BY BANKRUPTCY. The suspension of legal proceedings against a person declared a bankrupt, as provided for by the United States bankrupt law, does not affect or modify his obligations, but only temporarily suspends the remedy for their enforcement.

CONSTRUCTION OF SECTION THIRTY-TWO OF PRACTICE ACT. Section thirty-two of the Practice Act does not provide a rule for the disposition of actions against several joint debtors, where all have been served and appeared, and the proceedings against one are suspended by bankruptcy.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

This was an action commenced January 25th, 1868, by Z. B. Tinkum and Sidney Huntoon, partners doing business under the name and style of Tinkum & Huntoon, against John D. Winters and William T. O'Neale, partners, doing business under the name and style of Winters & O'Neale, to recover the sum of one thou-

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sand four hundred dollars for lumber sold and delivered. An amended complaint was filed March 21st, 1868. On the twenty-seventh of the same month Winters answered, setting up that he had been, on March 2d, on his own petition, duly declared a bankrupt by the United States District Court, and on his motion all the proceedings in this action were stayed as against him until the termination of the bankruptcy proceedings then pending. On April 4th, O'Neale answered, and asked for a stay of proceedings until the question of final discharge in bankruptcy of his copartner should be adjudicated. This the Court below refused to do, and the case proceeded to trial, and resulted in a judgment against O'Neale for the sum demanded in the complaint. From the judgment so rendered against O'Neale this appeal was taken.

Mesick & Seeley, for Appellant.

The obligation alleged in the complaint against the defendants is in its nature joint, being simply a copartnership liability. (*Mason v. Eldred*, 6 Wallace, 234.)

On such a contract judgment cannot be entered against one only of the joint obligors, while objecting that the proceeding must include all. (*Stearns v. Aguirre*, 6 Cal. 176; *Stearns v. Aguirre*, 7 Cal. 448.)

W. M. Seawell, for Respondents.

The defendant Winters became a bankrupt on March 2d, 1868. The provisions of the U. S. Bankrupt Act made him a bankrupt on March 2d, 1868, the time at which he was adjudged to be such by the U. S. District Court. (U. S. Bankrupt Act, Sec. 11.) Being such bankrupt on March 2d, 1868, and at the time of the rendition of judgment against the defendant O'Neale, such bankruptcy of Winters constituted no bar to the recovery of such judgment. (*Lewis v. Clarkin*, 18 Cal. 401.)

The judgment against the defendant O'Neale is also supported by the statutes of this State. (Stats. 1861, 338, Secs. 145, 146.) Nor was he prejudiced by the action of the Court in rendering judgment against him. He admits being liable for the debt sued for, with his codefendant Winters. Under the proceedings in

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bankruptcy he could prove against the estate of Winters for the proportion of the debt due by the bankrupt, and could recover from such estate such proportion, if the assets of the bankrupt were sufficient. (U. S. Bankrupt Act, Sec. 19.)

The action of the Court, therefore, in staying the proceedings against the defendant Winters should not be construed to the prejudice of the plaintiffs in delaying them from obtaining judgment against the defendant O'Neale.

Again, as the final discharge of the bankrupt cannot release or affect his cocontractor, (U. S. Bankrupt Act, Sec. 33) so neither can the application for such discharge release or affect temporarily or otherwise such cocontractor. (1 Parsons on Contracts, 29.)

By the Court, LEWIS, C. J.:

Upon the calling of this case for trial, the defendant Winters moved for a continuance as to himself, upon a sufficient showing that he had been adjudged a bankrupt by the United States District Court, for the District of Nevada. It appeared from his affidavit, and it is admitted as a fact in the case, that no hearing had been had in that Court upon his petition, and that he had not received his discharge. The continuance was asked until the disposition of the matter by the District Court. The motion being granted, the defendant O'Neale then objected to the trial proceeding against him, arguing that as the obligation sued upon was joint between himself and Winters, a joint judgment only could be rendered thereon, and hence the trial should not proceed against him until it could also proceed against Winters, or he was finally discharged by the decision of the District Court. Such, also, is the conclusion to which a careful consideration of the question has conducted us.

Partnership obligations are joint in their nature, at least to the extent that one partner may always take advantage of the non-joinder of his copartner in an action on a copartnership contract. "It is true," says Justice Field, speaking for the Supreme Court of the United States, in *Mason v. Eldred*, (6 Wallace, 231) "that each copartner is bound for the entire amount due on the copartnership contracts, and that his obligation is so far several,

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that if he is sued alone, and does not plead the nonjoinder of his copartners, a recovery may be had against him for the whole amount due upon the contract; and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements, or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The members undertake joint enterprises, they assume joint risks, and they make in all cases joint liabilities."

So, too, it has been repeatedly held, and is now the settled law of this country, except when altered by statute, that a judgment against one partner upon such contract merges the debt, and constitutes a bar to subsequent action for the same breach against his copartner. (See *Mason v. Eldred*, *supra*, and cases there cited.) Hence, whenever there is a failure to make all the partners defendants in a suit upon a partnership undertaking, those who are sued may plead that fact in abatement of the action, unless those not brought in have some ground of personal release, such as infancy, or a discharge in bankruptcy. If the omission of any joint obligor be a sufficient ground for abating the action against the other, why should not the continuance of it, as to one, entitle the other also to a continuance? Certainly the right is not limited to the mere uniting of all parties in the pleading; it cannot stop with so idle a ceremony. The right to have all the joint obligors united as defendants is subordinate to, and results from, the ulterior right that a joint judgment must be rendered against all. When the obligation or liability is joint, each party may properly claim the enforcement of it according to its terms. This is undoubtedly the foundation of the right of every joint obligor to plead in abatement, when there is an omission to join all who are jointly liable with him. The prosecution of a suit against one of several joint debtors, all of whom are united as defendants, is certainly as prejudicial to him as the entire failure to unite them in the action would be; for although united

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with him, if the action be prosecuted against him alone, and judgment be obtained, the result, so far as his rights are concerned, is the same as if they were not united with him at all, for the judgment so obtained against him would merge the debt so that no judgment could afterwards be obtained against the others. We see no reason why the rule, that a judgment against one joint debtor releases all others, should not apply in a case of this kind where all are made parties, but only one is proceeded against, as to a case where only a part of the joint obligors are in the first place united as defendants. The judgment rendered here against O'Neale certainly merged the contract, as though he alone were made defendant. The plaintiffs could proceed upon it and issue execution precisely as if Winters had not been made a party to the action. Why, then, should not the judgment have the same effect as if O'Neale only were sued? In our opinion the effect is the same where all are sued, but the action is prosecuted and judgment allowed against less than all, as when less than all are in the first instance united as parties, and judgment obtained only against them.

If each joint obligor has the right to demand the joinder of all who are liable with him, and that the judgment shall be joint against all, it would seem to be a necessary corollary that the Courts have no authority to proceed in a manner which will defeat that right, unless there be a waiver of it in some way by those who claim it. If the Court cannot properly proceed, where there is an omission of one joint obligor, and that fact is taken advantage of by plea, it would seem to follow that it would not have the right to proceed with the trial and render judgment against less than all, otherwise the right to plead in abatement for nonjoinder of parties would be an entirely useless ceremony. Here not only was the judgment not joint against both defendants, but the judgment against O'Neale alone made it impossible afterwards to render any against Winters.

If Winters were *discharged* in bankruptcy there could be no doubt of the plaintiffs' right to proceed against O'Neale alone, as was done; but he has not been so discharged, and may never be. He is simply adjudged a bankrupt upon the filing of his petition in

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accordance with the Act of Congress. Whether he will be discharged or not, is a matter to be hereafter determined. It is true, the Act declares that "no creditors where debt is provable under this Act shall be allowed to prosecute to final judgment any suit in law or equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the bankrupt, be stayed." But such suspension of legal proceedings against him does not in the slightest degree affect or modify his obligations, but only temporarily suspends the remedy for their enforcement. It is the final discharge alone which releases him, and destroys the creditor's right. And it is only when it appears that one or more of the joint obligors were never liable, or when he has been absolutely discharged from the contract, that the others may be proceeded against. There is a mere temporary suspension of that right to *sue*. We can find no case where a temporary suspension of the remedy against one joint debtor authorized proceedings against the rest. We are of the opinion, therefore, that this suit should have been continued, not only as against Winters, but also as to O'Neale, until the determination of the proceedings in bankruptcy, at which time, if Winters were discharged, the action might proceed against O'Neale; if not, then against both defendants.

The Practice Act of this State has afforded us no aid in the solution of this question, as it seems to contain no provision covering a case of this kind. It does not come within the letters of section thirty-two, for that only authorizes the prosecution of the action against less than all of the defendants jointly indebted when service of summons has not been had on all, or there has not been an appearance of all. In this case, however, both defendants were served with summons, and both appeared in the action; hence that section does not cover it. It may be said that this case comes within the reason and spirit of the section. It is possible that it does, although we are not satisfied of that, and as the language of the section clearly and unmistakably embraces only those cases where all have not been served, or appeared, we have no right to extend it to cases where all have been served or appeared. Section one hundred and forty-six of the Practice Act only author-

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izes several judgments where such judgments may be legally rendered; that is, when the liability is several, which is not the case here.

The Court below therefore erred in refusing to continue the cause upon the application of the defendant O'Neale. The judgment rendered against him is for these reasons erroneous, and must be reversed.

THE STATE OF NEVADA, RESPONDENT, v. AH LOI, APPELLANT.

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9	190
5	99
26	215

DECLARATIONS OF PERSON ROBBED AS PART OF RES GESTÆ. On a trial for robbery the declarations of the person robbed as to the fact of the robbery, made immediately after the crime was committed, are admissible in evidence as part of the *res gestæ*.

CONTEMPORANEOUSNESS OF DECLARATIONS AS PART OF RES GESTÆ. To make the declarations of a party injured part of the *res gestæ*, they must be contemporaneous with the crime; but in order to be contemporaneous within the meaning of the law it is not indispensable that they should be precisely concurrent in point of time: if they spring out of and elucidate the transaction, and are voluntary and spontaneous, and made so near the time as reasonably to preclude the idea of deliberate design, they may be regarded as contemporaneous.

INDICTMENT FOR ROBBERY—OWNERSHIP OF PROPERTY. Robbery may be committed by the taking of property from the person of one who has nothing but a special right in it; and where an indictment charged that the property was taken from the person of the prosecuting witness, and at the same time alleged it to be the property of another person: *Held*, a sufficient charge of a special property in the prosecuting witness.

INSTRUCTIONS NOT APPLICABLE TO CASE. It is no error to refuse an instruction which is correct abstractly considered, when it is not applicable to the circumstances of the case.

APPEAL from the District Court of the First Judicial District, Storey County.

R. H. Taylor, for Appellant.

E. W. Hillyer, for Respondent.

By the Court, LEWIS, C. J.:

The defendant was indicted in the District Court of the First

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Judicial District for robbery; convicted by the jury, and sentenced by the Court to imprisonment for the term of five years. The case is brought to this Court upon a bill of exceptions—the errors complained of being:

1st. The admission in evidence of the statement of the prosecuting witness with regard to the robbery, made a few minutes after it occurred.

2d. The indictment is defective in this: whilst it charges that the money was taken from the person and against the will of Ah Loi, it is shown that it was the property of one Frank, who it appears from the evidence was her husband.

3d. The Court misdirected the jury.

The position taken by counsel for the prisoner upon the first assignment is clearly not maintainable upon the authorities. The statement made by the prosecuting witness, that she had been robbed—a very few moments after the crime was committed, and whilst she was still weeping because of the loss of the money taken from her—was undoubtedly admissible as a part of the *res gestæ*, and confirmatory of the evidence given by her. In the case of the *Commonwealth v. M. Pike*, (3 Cush. 181) the Supreme Court of Massachusetts ruled, that the statement made by a person who had received a mortal wound a few minutes before, as to the cause and manner of the injury, was admissible as being in the nature of the *res gestæ*; Dewey, J. saying, in delivering the opinion, “that the period of time at which these acts and statements took place was so recent after the receiving of the injury as to justify the admission of the evidence as a part of the *res gestæ*. In the admission of testimony of this character much must be left to the sound discretion of the presiding Judge. So where a man was killed in consequence of having been run over by a cabriolet it was held, on an indictment against the driver for manslaughter, that what the man said immediately after receiving the injury was admissible in evidence. (6 C. & P. 325.) To make declarations a part of the *res gestæ*, it is true, it is said they must be contemporaneous with the main fact; but in order to be contemporaneous they are not required to be precisely concurrent in point of time. If the declarations spring out of the transaction—if they elucidate

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it—if they are voluntary and spontaneous—and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design—they may be regarded as contemporaneous. (6 C. & P. 325. See also, *Mitchum v. The State*, 11 Ga. 615; Corwin & Hill's Notes to Phillips' Evidence, Note 432.) Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received, and under such circumstances as to place it beyond all doubt that they are not made from design or for the purpose of manufacturing evidence. Hence, from the very nature of the thing, very much must be left to the discretion of the presiding Judge. Here the statement was made immediately after the robbery, and under circumstances which made it eminently proper to admit it. Supported as this ruling by the Court below is by the general current of decisions, it must be sustained.

Upon the second assignment also, our investigations have conducted us to a conclusion adverse to the prisoner. Robbing is by our statutes defined to be the "felonious and violent taking of money, goods, or other valuable thing, from the person of another by force, or intimidation." Such also is substantially the common law definition of the crime. But it is argued for the prisoner, that to constitute this offense the property must be taken from the possession of the real owner; hence, it is contended, this indictment is defective, as it is charged the money was taken from the person and possession of Ah Loi, who it is shown was not the owner. It will be observed, that the gist of this crime is the violent taking of property from the person of another, against his will and by means of intimidation. It would not, therefore, appear to be essential that the person robbed be the absolute owner of the property taken. If it appear that it was not the property of the prisoner, it ought under the definition of the crime to be sufficient. If the person robbed have a general or special property in, or a right to the possession of, the goods taken, it is sufficient: otherwise the statute would be defeated; and there would be no robbery, except when property is taken from the person, or the immediate presence of the absolute owner. Such is fortunately not the law. Robbery may be committed by the taking of property from the person of

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one who has nothing but a special right in it, as well as from the general owner. Here it is charged, that the money was taken from the person and possession of the prosecuting witness; this, with the further allegation that it was the property of Frank, is a sufficient charge of a special property in Ah Loi.

This precise question came before the Supreme Court of California in the case of *The People v. Shuler*, (28 Cal. 490). And an indictment was held sufficient which charged the felonious taking of money belonging to Whiting from the person of the prosecutor Wyckoff, the Court saying: "It is not necessary that the property should belong to the party from whose person it was feloniously taken." This indictment was sufficient.

The instruction that "when one witness only swears to facts tending to show the guilt of the defendant, and another witness alone swears to facts fully rebutting the testimony for the prosecution, and both witnesses are of equal credibility, the jury should find a verdict of not guilty," which counsel for the prisoner asked to be given to the jury, was properly refused, for the reason that it was not applicable to the circumstances of the case; the prosecuting witness being corroborated to some extent by the other witnesses—hence, even if the instruction were abstractly correct, it was properly rejected in this case.

**WESTERN UNION TELEGRAPH COMPANY, APPELLANT,
v. ATLANTIC AND PACIFIC STATES TELEGRAPH
COMPANY, RESPONDENT.**

EX PARTE CRANDALL, (1 Nev. 294) as to the point that the authority of Congress to regulate commerce between the States is not exclusive but paramount when exercised, approved.

TELEGRAPHIC COMMUNICATION—"COMMERCE." Telegraphic communication between the States is a part of their commercial intercourse, and its regulation as commerce is within the constitutional jurisdiction of Congress.

POWER OF CONGRESS AS TO TELEGRAPH LINES. The Act of Congress of 1866, in aid of telegraph lines, etc., (14 U. S. Stats. at Large, 221) in so far as it prescribes privileges, conditions, etc., is an Act regulating commerce and supercedes State legislation.

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STATE TELEGRAPH FRANCHISES. The congressional grant to all persons under certain conditions of the privilege of constructing telegraph lines, (14 U. S. Stats. at Large, 221) overrules any exclusive privilege given by any State or Territory to one.

PROOF OF ACCEPTANCE UNDER CONGRESSIONAL TELEGRAPH ACT. Where a telegraph company claims privileges under the Act of Congress of 1866, (14 U. S. Stats. at Large, 221) it is incumbent on it to show an acceptance by it of the terms prescribed in the Act, and the most proper mode of doing so is by a certified copy of the acceptance filed under the seal of the department.

EVIDENCE—LETTER OF U. S. POSTMASTER-GENERAL. Though a letter of the U. S. Postmaster-General, to the effect that the acceptance by a telegraph company of the terms and conditions of the Act of Congress relating to telegraph line, (14 U. S. Stats. at Large, 221) had been received and placed on file, might be proof of such acceptance, it cannot be so without authentication of the signature.

APPEAL from the District Court of the First Judicial District, Storey County.

On February 9th, 1864, the Legislature of Nevada Territory granted to John B. Watson and his assigns the right to construct and maintain a telegraph line from Unionville by way of Star City, Austin, Virginia City, Gold Hill, and Carson City, to the State of California, by a route north of Lake Bigler, (Stats. 1864, 97). Watson assigned to H. W. Carpentier, who assigned to the California State Telegraph Company. After the construction of the line by that company the Governor of Nevada certified its completion, and the franchise thereby became, as provided by the Act, an exclusive one for five years. In May, 1867, the California State Telegraph Company leased the line to the plaintiff for one year, and until the termination of the lease by either party on six months' notice.

In 1868, the respondent proceeded to construct a telegraph line along the U. S. Mail routes connecting Virginia City, Gold Hill, and Reno, with California. This suit was commenced on February 13th, 1869, for the purpose of obtaining an injunction pending the suit restraining the respondent from proceeding with its construction or doing telegraphic business between any of the places mentioned in its franchise; for a perpetual injunction to the same effect on final decree, and for six hundred dollars damages.

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Williams & Bixler, for Appellant.

I. Is telegraphing commerce, and the regulation thereof, a regulation of commerce? We claim not. (*Ex parte Crandall*, 1 Nev. 294; *Crandall v. State of Nevada*, 6 Wallace, 35; 1 Black. 631; 1 Kent, 366; 3 How. 162; 14 How. 574; 18 How. 430; 20 How. 93; 3 Wallace, 51.)

Congress has not attempted to regulate telegraphy, and until it shall do so, the States have control of the subject. The Act of Congress, under which defendant claims to act, only gives the right of way over public lands and along post-routes, but does not attempt to regulate the business.

II. Plaintiff's franchise is private property, and cannot be taken for public use except upon first making just compensation. (See cases cited under last point, and 4 Howard, 517; 10 Barb. 233; 2 Gray, 1; 6 Howard, 529.)

George Cadwalader, for Respondent.

I. Is the Act an attempt to regulate the business of telegraphing between two States? The manner of regulating this species of traffic is of no concern to us, provided there existed the power of regulation. The manner of the regulation here, was by obliging to go in one channel by closing up all others. Commerce is the synonym of "intercourse"—*Gibson v. Ogden*, (9 Wheaton, 174)—the definition of which is broad enough to include "telegraphing": a new kind of business originating since the Constitution. The line of defendant is but a conduit of commerce between California and Nevada. If traffic over it is unlawful, it is because the Territory of Nevada has so regulated it by declaring that all such traffic shall be carried on by lines erected by Watson or his assigns; and this, we conceive, is exactly what the Constitution intended that States should be without the power to do. (*Carson River Lumbering Co. v. Robert Patterson*, 33 Cal. 334.)

II. The case shows that the defendant has accepted the provisions of the Act of Congress, and become a public vehicle of intercourse, as far as that Act can make it. This Act makes our presence in Nevada lawful—the Territorial Act makes it unlawful.

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The General Government invites us to build, and bargains for the use of our line, on its own terms, for postal, military, and other purposes: while the other, stamps the intercourse as an unlawful infringement upon the rights of Watson or his assigns. Both regulations cannot stand; and the question is, which shall? Can it be doubted which is the dominant authority? (See *People v. Raymond*, 34 Cal. 495.)

III. Defendant was created a corporation for the purpose of connecting, by telegraph, San Francisco with Chicago and the intermediate points. Should power exist in the Territory of Nevada to stop it from passing over its territory during the lifetime of the Act of 1864, the same power would exist in Utah and Colorado, and the States of Nebraska, Iowa, and Illinois; and hence, a refractory State or Territory would have the right to prohibit intercourse between citizens of the United States at its pleasure.

The Government of the United States would exist more in name than in fact, if each State or Territory had the power, at their discretion, to regulate commercial intercourse between the States. What is "rightful legislation" on the part of a Nevada Assembly is uncertain; but it surely does not extend to granting such franchise as the one which threatens our existence in the State of Nevada. Does a stream rise higher than its source? Can the military and postal service, which we have bargained to give the Government depend upon the sanction of Nevada?

C. J. Hillyer, also for Respondent.

A careful examination of the opinion of this Court in *Ex parte Crandall*, which seems to me to have been substantially approved by the Supreme Court of the United States, shows that there is nothing in that opinion to lead the Court to uphold the constitutionality of the Nevada Act under the commercial clause of the Constitution. The reasons given for holding the passenger tax not to be a commercial regulation do not apply to a law prohibiting free intercourse by telegraph between the important business places of two States; and whether the power to regulate be exclusive is immaterial, as in this case. Congress has legislated, and we are acting under that legislation. The general principles, however,

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announced by the Supreme Court in the *Crandall Case*, with regard to the respective powers of the National and State governments, seem to us conclusive of this case, independent of all questions respecting the regulation of commerce.

By the Court, WHITMAN, J.:

The appellant seeks an injunction against respondent, to restrain it from prosecuting the business of telegraphy in the State of Nevada, claiming to be the present proprietor of the exclusive right thereto, as lessee of the assignee of one Watson, franchisee under an Act of the Legislature of the Territory of Nevada.

This appeal is from an order of the District Court refusing a temporary injunction. Several objections are made to the present validity of the franchise, all of which, with the exception of these immediately hereafter noted, are fully obviated by the certificate of the Governor, made conclusive by the terms of the Act referred to. It is claimed that the lessor of appellant, the California State Telegraph Company, did not succeed to the rights of Watson; the proof on the point shows that it did. Finally, it is objected that as the Act in question is an attempt to regulate commerce between States, it is an invasion of the exclusive powers of Congress over such matters. Admitting for the present, that such was the intention and effect of the statute, and without any minute recital of authorities, or extended argument, suffice it to say, that upon careful review of the cases touching the question, the conclusion reached in *Ex parte Crandall*, (1 Nev. 294) is still maintained, and that not only the weight of authority but principle sustains the opinion, that the authority of Congress as to such regulation is not exclusive, but that a State may properly enact laws regulating commerce between itself and other States, in the absence of Congressional legislation, subject always to the paramount authority of that body when exercised upon the matter.

The last published case decided by the Supreme Court of the United States, where the point was involved, makes the distinction that in some cases of the regulation of commerce the power of Congress is exclusive; in others, not. That seems to be an admission of the proposition that in the strict use of terms it is not an

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exclusive power. (*Crandall v. State of Nevada*, 6 Wallace, 35.) This investigation in the present case becomes material only in view of the plaintiff's right to bring any action, as Congress has passed an Act (14 U. S. Stats. at Large, 221) which, if held to be a regulation of commerce, brings the parties within an undisputed rule. Whatever doubts may have existed as to the power of the several States to regulate commerce between their own citizens and the citizens of other States, in the absence of legislation on that subject by the Congress of the United States, it has never been seriously questioned, that when Congress in the exercise of its constitutional right, does legislate on that particular subject, its authority is paramount, and its enactments supersede all State legislation thereon. Conceding, then, plaintiff's right of action, unless defeated by the Act of Congress cited, it becomes material to inquire whether such Act is a regulation of commerce. The Act is as follows :

"AN ACT TO AID IN THE CONSTRUCTION OF TELEGRAPH LINES, AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY, AND OTHER PURPOSES.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been, or may hereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States: *provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads, and any of such companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials, for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph,

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and may preëempt and use such portion of the unoccupied public lands subject to preëmption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station, but such stations shall not be within fifteen miles of each other.

“Sec. 2. *And be it further enacted*, That telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

“Sec. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this Act to any other corporation, association, or person: *provided, however*, that the United States may at any time after the expiration of five years from the date of the passage of this Act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects, of any or all of said companies, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

“Sec. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this Act.”

Congress has power “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” (U. S. Const., Art. I, Sec. 8.)

What is commerce? “Commerce is intercourse,” say writers and judges. There is no need to attempt here any definition of the word “intercourse,” nor to consider whether it was used with or without limitation: and if with limitation, what; for the Supreme Court of the United States, by one of its ablest members, has given a plain and comprehensive exposition of the term “commerce,” less general than the mere word “intercourse” used, without qualifica-

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tion, but sufficient to include all the ramifications of commerce. Says Marshall, C. J.: "It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." (*Gibbons v. Ogden*, 9 Wheaton, 1.) Is telegraphy any branch of commercial intercourse? To ask the question is to answer it. So interwoven has the custom of communication by telegraph become with trade and traffic, that to separate it without serious disturbance of vast trade relations and financial transactions, would be a task as difficult as to cut the pound of flesh without a single drop of blood. It is the life and soul of civilized commercial transactions; many of the most important are daily ruled by telegraph. The banker, the merchant, the farmer, the broker, all traders depend upon the telegraph for speedy information and means of intercourse in their various business and traffic. If the ship that carries the cargo comes within the constitutional power of Congress to regulate commerce, as it confessedly does, as a means of commercial intercourse, certainly the instrumentality through which is directed the lading, sailing, and unlading of the ship, the purchase and sale of the cargo, and all the minutiae of the venture and the voyage, is equally a means, only of a higher and more advanced grade.

Commerce, though it would be seriously crippled, could exist without telegraphy, as it might without many of its favoring incidents; but it is one of the adaptations of modern science, so simple in its grandeur as to be already accepted almost without wonder, but which the slightest reflection teaches is of such vast utility that it can hardly be too highly prized, nor can any unlawful infringement upon its free use and enjoyment be too carefully guarded against.

Does the Act of Congress attempt to regulate this branch of commercial intercourse? On the part of appellant it is claimed not, because no specific rules are prescribed for its exercise. The Act gives to any telegraph company the right to construct, maintain, and operate telegraph lines on the public lands of the United States, and along the post and military roads, upon evidence of acceptance of its terms under specified restrictions, and for certain compensation, which is the priority of Government messages, and

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the privilege of purchase, at option, by the United States, at any time after the expiration of five years. To that extent, then, there is regulation; the right is given by rule, and limited by rule, certainly as much regulated as the licensing or registering of vessels. By obtaining a license under certain terms, an owner may navigate his vessel between specified State ports, and traverse designated waters. A register gives other and greater privileges, under other and peculiar restrictions; both are regulations of commerce. In the particular matter in question, the Congress could undoubtedly exercise greater power, and still further regulate, but any regulation is sufficient to supercede State legislation, and the right granted to all overrules any exclusive privilege given by any State or Territory to one. Has the defendant brought itself within the Act? As a matter of fact it may have done so—probably has, but it failed to make the requisite proof in the District Court.

It is possible that the letter from the Postmaster-General would have been sufficient, had his signature been authenticated; but the regular and proper mode would require a certified copy of the acceptance, filed under the seal of the department. This, not that the Court might judge of the sufficiency of the acceptance, but that it might be satisfied that the United States Government, through the agent appointed, held in the records of the postal department, what it considered an acceptance under the Act of Congress, and that consequently the party filing the same had complied therewith, and was qualified to act thereunder. Without this proof, defendant stood in Court a trespasser upon the exclusive franchise of appellant, as only by virtue of lawful proceeding could any right be acquired against it. Right upon the other points considered, the District Court erred in this, and unless the case was held open for further evidence, should have granted the temporary injunction, "or injunction pending the suit."

Its order is reversed, and the cause remanded.

Clarke v. Irwin.

**THE STATE OF NEVADA EX REL. ROBERT M. CLARKE
v. EDWARD IRWIN.**

5	111
21	288
21	330
21	523
21	525
29*	975
32*	440
34*	872
34*	873

CONSTITUTIONALITY OF WHITE PINE COUNTY ACT. The Act creating the County of White Pine and providing for its organization (Stats. 1869, 108) is not in conflict with sections twenty, twenty-one, or thirty-two, of article four of the Constitution.

5	111
7	28
8	338
9	238
11	138
15	249
15	267
16	442
18	419
4*	740
18	420
4*	741

PRESUMPTION OF CONSTITUTIONALITY OF STATUTES. The power of determining whether a given statute is repugnant to the principles of the Constitution with which it is alleged to conflict belongs to the judiciary, and their decision is conclusive; but in all cases of doubt, every possible presumption and intendment will be made in favor of the constitutionality of the act in question.

"LOCAL" AND "SPECIAL" STATUTES. A "local" act is one operating over a particular locality instead of over the whole territory of the State; a "special" act is one operating upon one or a portion of a class instead of upon all of a class.

5	111
23	411

ACT ORGANIZING NEW COUNTY LOCAL AND SPECIAL. The White Pine County Act (Stats. 1869, 108) as it refers to only one new county and its organization, instead of to all new counties, and to those only of a class or whole, occupying or proposing to occupy such county, is a local and special act.

CONSTITUTIONAL CONSTRUCTION—ORDINARY MEANING OF WORDS. Words used in a Constitution, unless qualified so as to alter their ordinary and usual meaning, must be received in such meaning.

DEFINITION OF WORD "ELECTED." The word "elected" in its ordinary signification carries with it the idea of a vote, generally popular but sometimes more restricted, and cannot be held the synonym of any other mode of filling a position.

MEANING OF "ELECTION" AND "ELECTION BY THE PEOPLE," IN CONSTITUTION. The words "election," in section twenty-six, and "election by the people," in section thirty-two, of article four of the Constitution, contemplate the same mode of election and imply a popular vote.

WHITE PINE COUNTY ACT DOES NOT "REGULATE ELECTIONS." The Act creating White Pine County and providing for its organization (Stats. 1869, 108) does not regulate the election of county and township officers, and is therefore not repugnant to section twenty, of article four of the Constitution.

MEANING OF "APPLICABILITY OF GENERAL LAWS" IN CONSTITUTION. A general law to be "applicable," in the sense in which the word is used in section twenty-one, of article four of the Constitution, must answer the just purpose of legislation, that is, best subserve the interest of the people of the State, or such class or portion as the particular legislation is intended to affect.

ELECTION OF WHITE PINE COUNTY OFFICERS. The White Pine County Act (Stats. 1869, 108) does not violate section thirty-two, of article four of the Constitution, requiring county officers to be elected by the people.

APPOINTMENTS TO NEW COUNTY OFFICES OR VACANCIES. The Constitutional provision requiring county and township officers to be elected by the people,

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(Art. IV, Sec. 82) does not apply to cases of emergency or special occasion, such as the creation of a new office or a vacancy.

POWER OF GOVERNOR TO APPOINT TO VACANCY. Before the Governor can exercise the appointing power of filling a vacancy (Const., Art. V, Sec. 8) two things must concur; there must be a vacancy and no provision made by the Constitution or any existent law for filling the same.

POWER OF LEGISLATURE TO FILL NEW OFFICES. The White Pine County Act (Stats. 1869, 108) created the new office of Sheriff of White Pine County, and appointed Irwin to the office: *Held*, that if there was no vacancy, the Legislature had the power to appoint; if there was a vacancy, the act creating the office and occasioning the vacancy filled it.

"VACANCY" IN NEW OFFICE. Where a new office is created and no person appointed to fill it, there is a vacancy.

MEANING OF "VACANT" IN CONSTITUTION. There is no technical or peculiar meaning in the word "vacant," as used in section eight, of article five of the Constitution; it means empty, unoccupied, without an incumbent; and it applies to new offices never filled, as well as to old ones vacated by death, resignation, or otherwise.

LEGISLATIVE POWER TO DECLARE WHAT SHALL OPERATE "VACANCY." Though the Constitution provides in some instances what shall operate a vacancy in office, such as absence of judicial officers, etc., this does not prohibit the Legislature from enumerating other causes.

POSSIBLE ABUSE OF LEGISLATIVE POWER. The possible abuse of legislative power is no argument against either its existence or appropriate exercise.

APPOINTMENT BY BOTH LEGISLATURE AND GOVERNOR. By the White Pine County Act (Stats. 1869, 108) Irwin was appointed Sheriff of that county, and the Governor granted him a commission as such: *Held*, whether the appointing power resided in the Legislature or in the Governor, Irwin was lawfully such Sheriff.

APPOINTMENT TO TAKE EFFECT AT FUTURE DAY. An appointment to a new office to take effect at a future day, when the act creating such office is to go into effect, is a good appointment.

INFORMATION in the nature of *quo warranto* to the Supreme Court.

The Act creating the County of White Pine and providing for its organization (Stats. 1869, 108) was passed by the Legislature on February 23d, 1869, and afterwards became a law by remaining in the hands of the Executive more than five days after its passage without his disapproval. It took effect on April 1st, 1869, since which time Irwin had been holding and exercising the functions and duties of the office of Sheriff of the new county, having in March received a commission as such officer from Governor Blasdel,

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to take effect on 'April 1st, 1869, and be in force thereafter until the first Monday in January, 1871.

The information was filed April 16th, 1869.

Thomas Wells, for the State.

I. Though we admit new counties may be created, and organized, we claim there are in the fundamental law of this State, strong and peremptory restrictions as to when and under what circumstances they may be created, and the machinery of their governments set in motion. Such counties must be systematized, so as to conform to the uniform system of county governments throughout the State. (Const., Art. IV, Secs. 20, 21, and 25.)

In this view White Pine County is not now, and cannot be constitutionally organized—because, first, it has not nor can, at present, have a district judge of its own; and, secondly, it cannot have, so to speak, a joint interest in a Judge, in common with another county, for which other county *only* he was elected. (Const., Art. VI, Sec. 5; 32 Cal. 140; 21 Cal. 415.)

Again, the Legislature cannot divest vested rights. In 1866, it made Lander County *alone* the Sixth Judicial District, and in so doing, it said to the people of Lander, that for four full years next after January 1st, 1867, they should have the *entire* time and services of the man they should choose as District Judge; and to the man chosen, it said, that for the compensation fixed, he should hold Court and discharge other judicial duties at *one*, and only one county seat, during the four years. The contract was mutual, for a valid consideration, and may be enforced, unless the Judge die, resign, or be removed. While therefore Judge Beatty holds, as now he holds, the office of Judge of the Sixth Judicial District, the county of White Pine can have no District Court. It is therefore not in possession of that system of government which prevails in all other counties of the State, therefore is not constitutionally organized; and the county not being a county *de jure*, has no legal officers.

II. But if the county be legally and *de jure* a county, respondent is not the legal and *de jure* Sheriff. His appointment by the Legislature gives no indefeasible tenure, for there was, when he was so appointed, no law in force giving such appointing power to the

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Legislature. His appointment and commission by the Executive are not according to section eight, article five, of the Constitution, and sections forty-one, and forty-nine, of the Act of 1866, 238; nor was there any law in force creating the county when the Governor appointed him. And further, the Constitution does not contemplate an original filling of any county office by appointment. (Const., Art. IV, Secs. 26 and 32.)

The Legislature cannot appoint county officers under the section of the Constitution last cited. The Legislature is required to provide by law for the election of all necessary county officers. These requirements are strictly mandatory, and ignore and cut off the original filling of them, in any other way than by election. *Expressio unius, exclusio alterius*, applies, for if the Legislature may adopt another mode than election for one, it may for all; if it may appoint for one or two years, it may for any and all time; and would be at liberty to repeal existing laws requiring elections by the people, pass no new law upon the subject, and at each session appoint county officers for each county, to serve until their successors were again in like manner appointed. (14 Wis. 163; 3 Brevard, 500; 6 Cal. 41; 29 Cal. 450; 34 Cal. 450; 3 Nev. 173; 2 Cal. 213; 34 Cal. 470; 30 Cal. 680; 10 Ohio, 509.)

An office that never had an incumbent does not become vacant, any more than a vacancy *happens* in the office of U. S. Senator, when it is made to exist because a State is originally admitted into the Union. An office cannot *become* vacant, which never had an incumbent in it, any more than a vacancy can *happen* in an office which never had an incumbent in it. What can cause an office to *happen* to be vacant? Not the fact that it was never filled, but the death, removal, or resignation of the incumbent, before the legal expiration of his term. What can cause an office to *become* vacant? Not the fact that it was never filled; but the death, removal, or resignation of the incumbent, before the legal expiration of his term. If the framers of the Constitution (Art. V, Sec. 8) intended the Executive to fill an office originally by appointment, they would not have employed language, the common force and acceptation of which is so utterly at variance with the meaning intended and the power sought to be conferred by it; for certainly the use of the

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words "the next election and qualification," necessarily raises the presumption that, for such office, there *had been* at least one previous election and qualification. (See Sec. 1555, 2 Story on Const. ; 5 Ind. 1 ; 10 Ind. 62.)

Again, by the Constitution, (Schedule, Sec. 22) if the Legislature create a new judicial district, the office of Judge thereof can originally be filled only by election by the voters of the district at the next general election after the creation thereof. This undoubtedly being true, how can a new county be created and organized, with a system of government *uniform*—like that of other counties—at a time when it cannot possibly have a District Judge or Court? Without them how could the public revenue, for the State and the new county, be collected? (See 7 Ohio, 546 ; 19 Ind. 401 ; Const'l Debates, 702, *et seq.*)

IV. The White Pine County Act is unconstitutional when tried by sections seventeen, twenty, and twenty-one of article four of the Constitution. The purview of the Act as expressed in the title is "the creation and organization of White Pine County"; and *that* only can be the subject legislated upon in the Act, save that matter properly connected with that *one* subject, may be put in. Again, as special legislation the Act is plainly inhibited, for that new counties can be created and organized under general laws, there is not a shadow of a doubt. (See also 12 Ind. 640 ; 14 Ind. 239, 305 ; 11 Ind. 199 ; 5 Ind. 4 ; 8 Ind. 217 ; 22 Ind. 461 ; 9 Ind. 363.)

Mesick & Seeley, for Respondent.

I. The spirit and language of the Constitution (Art. VIII, Secs. 1, 8, and 10) clearly indicate that the framers of that instrument intended, as the nature of the case itself seems to require, that new counties might and should be organized by special enactment. For otherwise, counties would have been included within the terms of section eight with towns and cities, which alone are there required to be organized by general laws. The omission of counties from the provisions of section eight appears to have been made *ex industria* by the framers of the Constitution. (*People v. Morrill*, 21 Wend. 563.)

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II. The thing which is complained of by the relator, namely, the filling of the county offices by the Legislature or by its direction made in the act of creation, was the exercise of a power not only not prohibited by the Constitution by any express provision, but a necessary adjunct of such creative power for making such municipal corporation operative for governing the county and performing its corporative functions until an election could be had under the general laws, and so prevent the anomaly of having a county without a county government. It is manifest in the nature of the thing that the corporate entity must precede the exercise of any corporate privileges or powers by the corporators. An interval of time must elapse between the two things. During this period of intervening time, the county offices must be filled otherwise than by an election by the people, or not at all. Nor can it be said that the government so organized preliminary to the exercise of the right of election by the people is in contravention of the constitutional direction that county officers shall be elected by the people. Such direction was undoubtedly intended as part of the *general* system of county government and of filling county offices, and in no way intended for or adapted to the emergencies and special occasions which might give birth to new counties and bring them in a position to fulfill their duties and perform their functions under the general laws of the State. (*Hedley v. The Board of Commissioners*, 4 Blackf.; *People v. Fisher*, 24 Wend.; *Stocking v. The State*, 7 Ind. 329.)

III. A previous filling of the county offices is indispensable to the holding of an election by the people. It would be idle to assume that anybody now in office by virtue of a popular election held in some other county could, against the legislative will, by virtue of such election conduct the affairs of this new county. (*People v. Morrill*, 21 Wend. 563.) It would be absurd to say that an election by the people to fill the offices of this new county in the year 1870, or at any other time, can be held unless those offices should first have been filled. A registration of voters, the preliminaries of making precincts, appointing election officers and keeping a record of them, must precede such election; the maintenance of the peace, protection of the voters and the ballot-box, must attend

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the election ; and a proper counting of the votes and record and proclamation of the result, with the granting of commissions and giving of bonds and taking of oaths of office, must intervene the election and the installation of any officer elected by the people.

IV. The appointment of the officers by the Legislature does not infringe upon either the popular right of election or the executive right of appointment. A popular election could not be held, and the Constitution confers the right of appointment on the Executive only in cases when there is no law in existence for filling the offices. But here, in the law creating the county, provision is made by the creative power itself for filling the offices ; and the creating includes the power of organizing, and the Legislature might as well itself appoint the various officers as delegate the power of making such appointments. It is idle to say that such appointments are invalid because the law making them is not general. It is general for White Pine County and the people of that county. It is not needed elsewhere or at any other time. If it be unconstitutional as a violation of the provisions of the Constitution in respect to special laws, it is difficult to see that any case can arise justifying the enactment of a special law.

V. As to what constitutes a vacancy in office, we submit that the construction of language adopted by the Court in the case of *Stocking v. The State*, (7 Indiana, 329) is to be preferred to the hypercriticism and refinements sought to be enforced in the case of the *State v. Meesmore*, (14 Wisconsin). It seems to us that the language "when from any cause any office shall become vacant," is sufficiently comprehensive to include the case of a vacant office never filled. One of the meanings given by lexicographers to the word "become," is, "to be ;" and it is not difficult to conceive that the framers of the Constitution used the term with that meaning.

C. J. Hillyer, also for Respondent.

Only two objections raised seem to merit reply : First, that the law is obnoxious to the constitutional provision respecting special legislation ; and, second, that it violates the provisions requiring the officers to be elected by the people. As to special legislation, it is clear that the law is not embraced within any of the enumerated

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prohibited subjects of section twenty, article four. It is not a law "regulating county and township business," nor "regulating the election of county and township officers," nor "providing for opening and conducting elections," for the reason that it makes no provisions about elections or county or township business; nor does it violate section twenty-one. The argument is that all or some of the provisions of the Act might have been the subject of general legislation, and that, therefore, it was unconstitutional to make them applicable to one special locality. If this be so, then there is an end of all discriminating, and therefore of all beneficial legislation. It might as well be all done by a machine. If this be so, the law incorporating the City of Virginia, the Act to aid the Virginia and Truckee Railroad, the Act for the relief of C. N. Noteware, the Sutro Tunnel Act, the Acts fixing the time of elections in Virginia, Gold Hill, and Austin, and the law fixing the terms of Court of Esmeralda County, are all unconstitutional.

It is plain, however, that the section referred to is purely directory, as clearly so as the clause prescribing what the title of a law shall embrace. (4 Cal. 388; 10 Cal. 306.) Its only meaning is, that the Legislature shall not enact laws which discriminate unjustly and oppressively, and that when the circumstances are the same the law shall bear equally. (17 Cal. 554.)

By the Court, WHITMAN, J.:

This is an information by the Attorney General of the State of Nevada in the nature of a *quo warranto*, to test the right of Edward Irwin to hold, exercise the duties, and receive the emoluments of the office of Sheriff of White Pine County.

The facts set forth are not denied; and it appears, that at the last session of the Legislature, a bill was passed, entitled "An Act to create the County of White Pine, and provide for its Organization." Certain parties were named in the bill as county officers, to hold until the next general election, Irwin was designated as Sheriff. Subsequent to the passage of the bill, and during the month of March, 1869, the Governor of the State commissioned Irwin as Sheriff; such commission "to take effect April 1st, 1869, and to be in force thereafter until the first Monday in January, A.D. 1871.

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On, or soon after the first day of April, Irwin qualified in the statutory manner, and is now acting as Sheriff.

Section eight of the Act is as follows: "The provision of this Act shall take effect, and be in full force, from and after the first day of April, A.D. 1869, at which time said county shall be duly organized."

The information avers that the Act is "unconstitutional and void." The specifications upon argument are:

First. Because it is contrary to that part of the Constitution of the State which prohibits the Legislature from passing local or special laws, regulating the election of county and township officers.

Second. Because it is obnoxious to that part of our Constitution which requires, that in all cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.

Third. Because it violates that part of our Constitution which requires county officers to be elected by the people.

Other objections are made by counsel for the State, which, if noticed, would involve the discussion of matter not properly before this Court, wherefore the consideration of this case will be confined to the above objections, with their necessary incidents.

The clauses of the Constitution referred to read thus: Art. IV, Sec. 20. "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * 'Regulating the election of county and township officers.' * * * Sec. 21. 'In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State.' Sec. 32. 'The Legislature shall provide for the election, by the people, of * * * Sheriffs, * * * and other necessary officers, and fix by law their duties and compensation.'"

The question presented is grave, not only in its immediate, but its ultimate consequences, and should be so decided as to settle the meaning of the constitutional provisions quoted or involved definitely, with reference to the future as well as the present, and the decision thereon should be unbiased by any considerations of policy or particular emergency. Endeavor will be made to that end.

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For forty years it has been held in these United States, "that the power of determining whether a given law is repugnant to the principles of a Constitution, with which it is alleged to conflict, belongs to the judiciary, and that their decision is conclusive." While the power is confessed, it is always exercised in subjection to certain rules of decision, which have been announced in an unbroken current of opinion, from the State Courts of last resort, and the Supreme Court of the United States, the substance of which is thus well expressed by Mr. Sedgwick: "The leading rule in regard to the judicial construction of constitutional provisions is a wise and sound one, which declares that in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and that the Courts will only interfere in cases of clear and unquestioned violation of the fundamental law. It has been repeatedly said, that the presumption is, that every State statute, the object and provisions of which are among the acknowledged powers of legislation, is valid and constitutional, and such presumption is not to be overcome unless the contrary is clearly demonstrated." Thus guided, attempt will now be made to construe the constitutional provisions before cited.

Is the Act a local or special law? Mr. Sedgwick makes "the leading division (of statutes) to be into 'public or general, and private or special.' Public or general statutes are, in England, those which relate to the kingdom at large. In this country they are those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operations, or by constitutional restraints. Private or special statutes relate to certain individuals or particular classes of men."

The twenty-second section of article fourth of the Constitution of the State of Indiana is verbatim with that of Nevada, save that it makes more exceptions to special legislation. Deciding upon a clause of such section it is said: "What is a special Act? It is such as at common law the Courts would not notice, unless it were pleaded and proved, like any other fact." (*Hingle v. The State*, 24 Ind. 34.) In Wisconsin distinction is made between the meaning of the word general, when used in opposition to the word private, and when used in distinction to the words special or local.

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It is said: "But it undoubtedly has other meanings. It is used as contradistinguished from local, and then it would mean operating over the whole territory of the State, instead of in a particular locality. It is used also as contradistinguished from special, and then it means relating to all of a class, instead of to one, or a part of that class." (*Clarke v. The City of Janesville*, 10 Wis. 180.) The converse of the latter definition will properly give the meaning of the words local and special, as used in the portion of the Constitution cited, and under such definition it will be seen that the Act in question is clearly local and special, as it refers to only one new county and its organization, instead of to all new counties; and to those only of a class or whole, occupying, or proposing to occupy, such county. Being, then, a local and special law, is it one "regulating the election of county and township officers?"

When words are used in a Constitution, unless so qualified by accompanying language as to alter their ordinary and usual meaning, they must be received in such meaning. The word "elected," in its ordinary signification, carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position. (*Magruder v. Swann*, 25 Md. 214.) This is clearly the sense of the use of the word in the clause referred to, especially when taken in connection with sections twenty-six and thirty-two referring to the same subject. Section thirty-two has been previously quoted. Section twenty-six reads thus: "The Legislature shall provide by law for the election of a Board of County Commissioners in each county." Now, although in one of those sections the Legislature is commanded to provide for an "election," and in the other for "an election by the people," it will hardly be contended that the same mode of election was not contemplated in both cases; and that for the reason that the ordinary meaning of the word "elected" implies a popular vote, unless otherwise qualified. When, then, the Legislature is prohibited from passing local or special laws "regulating the election of county and township officers," the prohibition runs against making distinctions between counties or townships in the matters of the popular election of their officers. In the Act under consideration no such attempt is made; the election of county and township

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officers is left under the general election law, subject to all its provisions; when that law operates there is an election, and not until then; at such time the offices and officers are regulated thereby. The Act is not then liable to the first objection made.

Could a general law be made applicable? The briefs on the part of the State answer that question unhesitatingly in the affirmative; but there is more difficulty about it than is admitted therein. It is not denied that the Legislature has power to erect a county—that is, to define its territorial limits and boundaries by special act, and thereby to subdivide one or more old counties; because it is said such action is clearly a part of proper legislative power not prohibited, and no general law could in such case be made applicable. It would seem that a general law could as easily be made applicable to the mere erection of a new county, as in providing for its organization. A general law might be passed, that all counties having a certain population should be divided, or that all counties having a specified area of territory might be divided. Of course, it is no argument to suggest or prove an error in the proposition as to legislative right to erect new counties by special law, and the reference is made simply to draw attention to the fact that hardly any case could be found or imagined where a general law could not be framed which would, in default of one special, answer some part of the purpose intended to be accomplished by legislation. But would such a general law be applicable, is always the question. A law, to be applicable in the sense in which the words are evidently used, and their only proper sense in such connection, must answer the just purposes of legislation; that is, best subserve the interests of the people of the State, or such class or portion as the particular legislation is intended to affect. A general law could undoubtedly be passed regulating the organization of new counties, but it would be exceedingly difficult, if not impossible, to make such law applicable.

The creation of a new county is in itself an act ordinarily demanded by the emergency of the occasion; but such emergency may be present or prospective, and is rarely in any individual instance, surrounded by the same or similar circumstances as would characterize another. In one case a law which provided for filling

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the offices at general election would answer the public necessity; in another, a provision for a special election would be appropriate; in another, that the officers of the county from whose territory a new one was formed, should act until the general election and qualification of officers might answer the purpose; but how evolve from these different schemes one which would be applicable to all, or even a majority of cases?

A partial illustration of the view sought to be expressed can be found in the state of facts probably prompting the legislation of last winter as to new counties. Thousands of people had centered in a portion of Lander County; immigration was on the increase; as usual in all newly-settled mining communities, there was a considerable number of lawless adventurers, and great demand on that and other accounts for immediate government. The county seat, the only place where county officers are obliged to keep offices, was distant more than one hundred miles. Here, then, was a case demanding immediate action.

On the other hand, immigration was tending to a point upon the Central Pacific Railroad and its vicinity, which would in all probability so increase before the next meeting of the Legislature, that a new county would there be a necessity.

For the first of these cases, the Legislature passed the present Act; for the second, "An Act creating the County of Elko, and providing for its Organization;" which county was placed generally under the charge of the officers of Lander County (Commissioners only being directed to be appointed, or named by the Governor) until it should appear in mode provided that a certain territory taken from Lander County contained more than a thousand registered voters, when an election was provided. If this number of voters did not exist by a certain time named, the county continued under the charge of Lander County officers, as above stated, until the next general election.

How frame a general law which would meet and be applicable to the different requirements of even these two cases?

It is suggested, that a newly-created county might and properly should remain in suspense, as to its ultimate and regular organization, until the general election next occurring after its creation; but

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in this case, it might never be organized, because it does not follow that the new county being so in suspense, its territory would be governed by any officers previously elected in the same territory. The new county being created under the Constitution and general laws of the State, the ordinary county and township offices presently exist. They are separate and distinct offices, which cannot be held save by some one elected or appointed thereto; and a provision that any officer previously elected should fill them would be open to the objection of special legislation as urged by the State in the present case.

A general law that all new counties should, until the general election next ensuing after their creation, be officered by those elected to hold similar offices in the territory of which the new counties might be formed, would have suited the occasion of White Pine County, perhaps; but how would it answer in one composed of portions of Lander and some other, or how could such a law be made applicable to a new county carved out of several old ones; or in the absence of a law, which of the old counties, or who of the old officers, would have jurisdiction? A discussion of this question to some extent will be found in *The Republic v. McLean*, (4 Yeates, 499). And as to the effect of the creation of a new county upon officers of the old, residing in the new, in *The State v. Choate*, (11 Ohio, 516), and *The People v. Morrell*, (21 Wend. 563) all of which cases throw light upon the general proposition under consideration.

The organization of a county is so incident to its creation, and flows so naturally therefrom, that it partakes of the special proceeding which brings the county into existence to so great a degree, that it is difficult, if not impossible, to effect it without more or less of special legislation, in order to have the law applicable. A general election could not be held in a new county without special action, votes could neither be registered without registry agents, nor counted without County Commissioners and County Clerk.

Whether a general law could be made applicable to the different cases likely to arise is, to say the least, doubtful. The Legislature has by its action decided not; and although its primary right to decide must be governed by the ultimate power of the Court of

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final resort to inquire into and decide the point. (*Thomas et als. v. Board of Commis. of the County of Clay et als.*, 5 Ind. 4.) Yet it is impossible in the case at bar, for this Court to say that a general law could be made applicable to the organization of new counties; and certainly it could not say, that the question is so free from proper and reasonable doubt, that there is a clear and evident violation of the Constitution in the passage of the Act under review; but admitting its unconstitutionality as to this point, then by the creation of the county a vacancy occurred, which the Governor was authorized to fill, as will be hereafter shown. Irwin then holding by his appointment constitutionally made, his right to the office would not be affected. The second objection must therefore fail.

Does the Act violate that part of our Constitution which requires county officers to be elected by the people? The clause referred to requires the Legislature to provide for such election; that the Legislature has already done, in passing a general and uniform election law, applicable to all counties in the State; but, because an office is elective and must under general laws be always so filled, it by no means follows that it cannot be filled temporarily by other means; and when the Legislature has provided generally and uniformly for elections of county officers, all has been done which the Constitution commands in that regard; the mandate does not apply to cases of emergency or special occasion, as the creation of a new office, or a vacancy. To assert the contrary is to prove too much, as it would follow that in no case could an elective office be filled save by election. This is true as a general rule, and under general laws; but the rule does not cover cases not falling under such general laws. (*State of Nevada ex rel. Bull v. Washoe Co. Commis.*, 4 Nev.) So it has been held under constitutional provision apparently more specific and mandatory than the one referred to. In New York the Constitution declared, that "Sheriffs and Clerks of counties shall be chosen by the electors of the respective counties once in every three years and as often as vacancies shall happen." Commenting thereon, Justice Bronson says: "There must of necessity be an interval of time between the death, resignation, or removal of the incumbent, and the filling of the vacancy by the

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electors ; and it is essential to the public welfare that some person should in the mean time discharge the duties of the office. The Legislature has provided that the vacancy shall be supplied by the people at the next general election after it happens, (1 R. S. 128, Sec. 8) ; and that in the mean time the duties of the office shall be discharged either by the deputy, or by a person appointed by the Governor, or by both of them. This space in which the office may not be filled by election can never exceed one year, and may sometimes amount only to a few days. How long it may happen to be, provided it do not extend beyond the next annual election, is a question, I think, fairly within the discretion of the Legislature. The language of the Constitution is not that the office shall be filled by election *in every possible case*, nor that a vacancy shall be supplied in that manner as *soon* as it happens ; but the language is, that vacancies shall be supplied by election as *often* as they happen. That end is fairly attained by referring the matter to the people, at their next stated period for exercising the elective franchise." (*People v. Fisher*, 24 Wend. 219.)

Quoting this language, Denio, C. J., remarks : "This view is so reasonable as to command the assent of every person." (*People v. Snedeker*, 14 N. Y. 52. See also, *Hedley v. The Board of Commissioners*, 4 Blackf. 116.) The case of *The State v. Messmore*, (14 Wis. 163) cited by counsel for the State, so far as it touches the present question, was decided upon constitutional provisions different from ours, and upon the ground that the Legislature, in erecting new judicial districts, must be deemed to know, that no present necessity existed for an immediate appointment, and had always legislated according to the construction placed by the Court on the Constitution. Section seven of article seven provides, that the Circuit Judges shall be chosen by the qualified electors of their circuits respectively, and shall be so classified by the Legislature that one of them shall go out of office annually, for six years, and that thereafter, all Judges should be elected for six years. Section six provides, that in case of an increase of circuits the Judge or Judges shall be elected as provided in this Constitution. The case is hardly in point, and even if it was, could not be held, unless upon much clearer reasoning than it seems to contain, to over-

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ride the authority of the cases cited from New York. As it is taken then, the third objection to the Act cannot be sustained.

Incident thereto, however, comes the question of the filling of the county offices. It is argued that the Legislature cannot fill, because the appointing power pertains to the Executive Department; and the case of *State v. Kennon*, (7 Ohio, N. S. 546) is cited in support of the position. The decision in that case is probably correct; but it is based upon a constitutional provision entirely unlike any to be found in the Constitution of the State of Nevada. By such provision the appointing power was expressly taken away from the Legislature and given to the Governor, as a recital of the clause will clearly show :

“The election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this Constitution or the Constitution of the United States, shall be made in such manner as may be directed by law; *but no appointing power shall be exercised by the General Assembly*, except as prescribed in this Constitution; and in the election of United States Senators, and in these cases the vote shall be taken *viva voce*.”

Under the foregoing provision the case above cited was decided—the Court holding that the law under consideration did not fall within the special exception; and that, to use the language of one of the Judges, “appointing power by the General Assembly is thus cut up by the roots, except only in the special cases, in which it is expressly given by the Constitution itself.”

In the Constitution of the State of Nevada, the appointing power of the Legislature is neither cut up by the roots, nor in any manner hampered, save where the Constitution itself, or the Federal Constitution, provides for filling a vacancy. The former prescribes the mode of filling vacancies only as to State officers and members of the Legislature; the latter, as to United States Senators and Representatives in Congress. In every other case the power is in the Legislature, to be by it regulated by law, as is evident from the fact that no provision is made save as to vacancies; and as to these, the following language is used :

“When any office shall from any cause become vacant, and no mode is provided by the Constitution and laws for filling such

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vacancy, the Governor shall have the power to fill such vacancy by granting a commission, which shall expire at the next election and qualification of the person elected to such office." (Const. Nev., Art. V, Sec. 8.)

Two things must then concur: there must be a vacancy, and no provision made by the Constitution, or no existent law for filling the same, before the Governor can exercise the appointing power. Now, if upon the creation of this new office, because it is such, as the office of Sheriff of White Pine County had no existence until the passage of the law creating the county, no vacancy occurred, the office remained to be filled by some power. The Governor had not that power, and there was no prohibition upon the Legislature, unless it exist in the constitutional provisions heretofore considered, and it has been seen that there it cannot be clearly found, as applicable to a case similar to the present; wherefore the office could be properly filled by the Legislature. If there was a vacancy, then the very law which created the county and occasioned the vacancy filled the same, and there was no such condition of affairs as section eight, article five, of the Constitution suggests; but upon this latter point it is unnecessary to express a decided opinion, for Irwin has not only the appointment of the Legislature, but the commission of the Governor, so if the case comes within the meaning of the section, he lawfully holds, if there can be a vacancy in a newly-created office, never previously filled.

There is some difference of judicial decision upon this question, and the State has cited cases claimed to show that the creation of a new office can never make a vacancy. The California cases conflict with each other, and do not meet squarely the precise point here presented. The case of *The State v. Messmore*, cited before, was as to the present question decided upon the following constitutional clause: "When a vacancy shall happen in the office of Judge of the Supreme or Circuit Courts, such vacancy shall be filled by an appointment of the Governor, which shall continue until a successor is elected and qualified; and when elected, such successor shall hold his office the residue of the unexpired term." The word "vacancy" is here so qualified by the last clause that the Court might well have expressed its opinion as claimed, but it went further and

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attempted to criticise the opinion of *Stocking v. The State*, (7 Ind. 327) upon the assumption that the language of the Indiana Constitution was in all "material respects" like that of Wisconsin, and remarked that the "learned Judges of Indiana in their discussion of the question seem entirely to have passed over the language of the section of their Constitution which authorizes the Governor to fill vacancies by appointment," Examination will show that both these statements are incorrect.

It is held in the case of *Stocking* that an appointment to fill a newly-created office was good under section eighteen, article five, of the Constitution, reading thus: "Sec. 18. When during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly, or when at any time a vacancy shall have occurred in any other State office, or in the office of Judge of any Court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." This is the section said by the Wisconsin Court to be in all "material respects" like that of Wisconsin, when it lacks entirely any such qualification as is contained in the latter clause of the section quoted therefrom—"and when elected, such successor shall hold his office the residue of the unexpired term;" which words force the construction that the vacancy spoken of could only exist, happen, or be where an office had been previously filled.

The language used by the Court of Indiana expresses the idea sought to be illustrated in this opinion, as to the meaning of the word "vacant," in the section under consideration from the Constitution of Nevada, so clearly and concisely, that it is adopted as part of this decision: "We lay no stress on the declaration of the Legislature that there was a vacancy in the office of Circuit Judge of the new circuit. If there was a vacancy, it existed independent of that declaration. If there was no vacancy, that body could not create one by a declaratory enactment. The vacancy flowed as a natural consequence of their doing what they had a right to do—to create a new circuit. There is no technical nor peculiar meaning to the word 'vacant,' as used in the Constitution. It means empty, unoccupied; as applied to an office without an incumbent,

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there is no basis for the distinction urged, that it applies only to offices vacated by death, resignation or otherwise. An existing office without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday. We must take the words in their plain, usual sense. (2 R. S., 223, 339, and 341.) The emergency which created the office would imply that the vacancy in the office of Judge in the new circuit should be filled immediately. The eighteenth section, article five, provides that the Governor shall, by appointment, fill a vacancy in the office of Judge of any Court. We think this appointment well made under that section." *Stocking v. The State*, 7 Ind. 327.) This case was sustained in *Rice v. The State*, (7 Ind. 332); *Driskell v. The State*, (7 Ind. 359) and *Collins v. The State*, (8 Ind. 350). So far, then, as the word vacant, in section eight, article five, is concerned, it applies as well to a new office as to one previously filled; but it is claimed that the laws of the State have declared what shall create a vacancy; the statute is not, cannot be, exclusive. The Constitution provides, in some instances, what shall operate a vacancy, as, in the case of judicial officers, an absence from the State exceeding three months; but this does not prohibit the Legislature from enumerating other causes. It has power so to do, and has done so; it could not properly provide that what the Constitution has said in any instance should make a vacancy, should not so do; but it may add as many other causes as it pleases, and it could not, by attempting to define the word "vacancy," limit the power of the Governor to fill a vacancy, as specified in section eight, article five, when the word applies as well to a new office as to one previously filled. It is said that frivolous or improper causes may be assigned; this may be so, and there may be no remedy: when the case arises it will be time to look for one; but to suggest the possible abuse of a power is no argument against either its existence or appropriate exercise.

The Legislature has already defined what shall constitute a vacancy in an office which has been before filled. Indeed, in subdivision five, of section thirty-five of the election law, it provides a cause which would apply to a newly-created office, if there had been an election therefor; but having done all this, does not pre-

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clude further declaration on the subject. That all cases should be provided for by general law, if the same can be made applicable, is true; but this and similar cases would seem to properly fall within the contemplation of the Constitution as instances where no law had been passed, and then the power must be in the Governor to fill them. While, therefore, it is not held that the Legislature could not properly name the county officers in the bill, nor that the case was one of vacancy which the Governor alone could fill, it is decided that if it fall in either category Irwin is lawfully placed. If the Legislature had the power to nominate, he holds its appointment; if there was no such power, or the power was improperly exercised, then the Governor had the appointment, and Irwin holds his commission.

The fact that the appointment was made by either Legislature or Governor before the first of April, cannot invalidate it; both were made to take effect upon a future day. Had the day never come, or Irwin died before, he held nothing under either appointment, the office was existent, but its duties were suspended until a time fixed. (*The State of Ohio v. Charles McCallister*, 11 Ohio, 46.)

The portions of the Act examined are so independent of the remainder, that the conclusions reached upon their constitutionality determine this case. No opinion is here expressed, nor intimation made, with reference to the part of the Act unexamined, as it would be idle to express an opinion, which could be no decision, for the reason that it was given with regard to matters not necessarily arising in the case.

As to that portion of the Act affecting Irwin, and of course officers in like circumstances, it is not unconstitutional, and judgment must be rendered for Irwin, that he is entitled to hold the office of Sheriff of White Pine County, as by him claimed.

It is so ordered.

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THE STATE OF NEVADA, RESPONDENT, v. CHARLES U.
McCLUER, APPELLANT.

DEGREE OF PROOF TO REBUT PRESUMPTION OF MURDER. A charge to the jury in a murder case that, if the intentional killing is established beyond a reasonable doubt, and the proof of the killing does not manifest that the crime amounted only to manslaughter, or was justifiable or excusable homicide, the burden of proving circumstances in mitigation, justification, or excuse, would devolve upon the defendant; and that "this burden being cast upon the defendant, it is not sufficient for him to raise a reasonable doubt in the minds of the jury whether or not such circumstances exist, but it is necessary for him to establish to your satisfaction, by preponderating proof, that there are circumstances to mitigate, justify, or excuse the homicide": *Held*, error.

ACCUSED PERSONS ENTITLED TO THE BENEFIT OF REASONABLE DOUBT, HOWEVER ARISING. In criminal prosecutions the guilt of the accused must be proved beyond a reasonable doubt; but if such doubt be raised, it makes no difference whether it be raised by the evidence for the prosecution or by that for the defendant.

PROOF REQUIRED TO SUSTAIN DEFENSE IN MURDER CASES. Where a voluntary homicide is proved by the State, and its testimony shows no circumstances of mitigation, excuse, or justification, the burden of establishing such mitigation, excuse, or justification, devolves upon the defendants; but he is not required to establish the facts constituting his defense either by proof beyond a reasonable doubt, or by proof preponderating over or outweighing that on the part of the prosecution.

STATE v. WATERMAN, (1 Nev. 543) in so far as it expresses an opinion that the rule there held, to the effect that a defendant in a prosecution for robbery is not required to produce preponderating proof to establish the facts of his defense, does not apply in cases of homicide, disapproved.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

The defendant was indicted at the September Term, 1868, of the Court below, for the murder of John H. Walker, committed in Lander County on July 29th, 1868, by shooting with a gun. The trial came on at the same term and resulted in a conviction for murder in the first degree. Motions in arrest of judgment and for a new trial having been overruled, the defendant appealed.

Aldrich & DeLong, for Appellant.

The charge of the Court below left the jury to infer, that even if

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from a view of the whole case—that is, from a consideration of the testimony adduced by the prosecution and the defendant—there should be in their minds a reasonable doubt of the guilt of the defendant, they must still convict of murder in the first degree, unless the doubt should be created by testimony adduced by the prosecution. In other words, the defendant must do more (a homicide having been committed by him) than to raise by his proofs a reasonable doubt in the minds of the jury as to his guilt. The law presuming malice in cases of homicide, he must negative the malicious intent by preponderating evidence. Should the jury have a reasonable doubt as to the malicious intent, they must still convict. This was an incorrect statement of the law in its application to the present case, and the defendant has been deprived by the charge of the benefit of that humane principle of law which requires an acquittal where there is reasonable doubt of guilt, whether that doubt be raised by the testimony of the prosecution or defense. Greenleaf (3 Greenl. Ev. 34) thus lays down the rule: “A distinction is to be noted between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases their duty is to weigh the evidence carefully, and to find for the party the evidence preponderates, although it be not free from reasonable doubt. But in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law that the guilt of the accused must be fully proved. Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the *fact* to the exclusion of all reasonable doubt. “For it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence.” (See also *Ogletree v. The State*, 28 Ala. 693; 1 Bishop’s Crim. Procedure, 503.)

The charge ignores entirely the existence of any reasonable doubt as to the intent or design with which the killing took place, unless that intent or design were discovered by the testimony for the prosecution.

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Again: The jury was told it was not for the State to prove beyond a reasonable doubt that the killing was malicious; but the malice being presumed, it was for the defendant to prove by preponderating evidence, etc., that the killing was not malicious. Does not this entirely ignore and overthrow the doctrine of presumed innocence?

Again: The charge informs the jury that the homicide being proven as having been intentional, malice is presumed; in other words, guilt of murder is presumed. The testimony shows that at the time of the killing the parties were each firing, and it is doubtful which fired first. Admitting that the law presumes murder under such circumstances, which degree of murder is presumed? We insist that only murder in the second degree is presumed, and that the jury should have been thus told. (See dissenting opinion of Lewis, J., in *State v. Millain*, 3 Nev. 474.)

Robert M. Clarke, Attorney-General, for the Respondent.

It is objected that the instruction of the Court below erroneously stated the rule of evidence. If it be not an entirely sufficient answer to this, that the instruction is in the words of the statute (Stats. 1861, 61, Sec. 33) transposed merely, the objection ought at least to be silenced by the repeated decisions of this Court. In *The State v. Waterman*, (1 Nev. 565) the Court says: "Whenever the prosecution establishes a voluntary killing on a trial for murder by proof of the first class, the law presumes malice, and dispenses with all proof thereof by the prosecution. If the defendant attempts to rebut this legal presumption, Courts have generally held that it is not sufficient to raise a doubt as to whether the defendant was actuated by malice, or an excusable motive in taking life. But there must be a preponderance of evidence in favor of the defendant on this point." (See also *The State v. Rufus B. Anderson*, 4 Nev. .)

[A number of other points were made and argued by counsel, but as they were not passed on by the Court, and would throw no light on the decision, they are omitted.]

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By the Court, LEWIS, C. J.:

The Court below in submitting this case to the jury, charged them in reference to the degree of proof on the part of the State necessary to a conviction, and on that of defendant to an acquittal, in this manner: "If however you should be satisfied beyond all reasonable doubt that the defendant did, on or about the twenty-ninth day of July last, in Lander County, voluntarily, that is intentionally, kill John H. Walker, the law raises the presumption that the killing was malicious, and consequently that it is murder; and unless the same proof that establishes the killing sufficiently manifest that the crime committed only amounts to manslaughter, or that the accused was justifiable or excused in committing the homicide, the burden of proving circumstances of mitigation, or that justify or excuse it, devolve upon the defendant. This burden being cast upon the defendant, *it is not sufficient for him to raise a reasonable doubt in the minds of the jury whether or not such circumstances exist, but it is necessary for him to establish to your satisfaction by preponderating proof that there are circumstances to mitigate, justify, or excuse the homicide.*"

What is to be understood by the latter clause of this charge? Clearly, that if the evidence on the part of the State whereby the killing is established did not also develope circumstances sufficient to reduce the crime to manslaughter or to acquit entirely, then the jury might convict of murder, unless the defendant proved by a preponderance of evidence, that is, as we understand it, evidence outweighing that of the State, that he was not guilty of that crime, and that it was not sufficient for him to raise a reasonable doubt in their minds as to whether he was so guilty or not. This, it seems to us, is the fair interpretation of this instruction. The expression "that it is not sufficient for the defendant to raise a reasonable doubt as to whether there were circumstances to justify the homicide," or not, certainly means, that if upon a consideration of the evidence, both for and against the defendant, that for him is only sufficient to make it reasonably doubtful whether he has established his innocence or not, the jury must convict. If it be claimed that the intention was simply to instruct the jury that the

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evidence on the part of the defendant taken entirely by itself in nowise considered with respect to the case made out by the State against him—that is, taking the affirmative facts or circumstances upon which the defendant relies for his defense, as if the proof by the State had not in the least disproved them, then the defendant's evidence is not sufficient if it only raise a reasonable doubt as to whether they exist or not; we answer that such is not the purport of the instruction, nor is it at all probable the jury so understood it. It appears plainly to instruct the jury that the State having made out its case and so thrown the defendant upon his defense, his evidence must do more than raise a reasonable doubt whether he was guilty or not, for if there be a reasonable doubt whether he has established the facts constituting the defense, of course the same doubt exists as to whether he be guilty on the whole evidence or not. Such is the impression which the language of the instruction is likely to convey, and it is hardly possible to presume that the jury did not so understand it. So interpreted, the instruction clearly to our mind misstates the law. It is a wise and humane rule of criminal jurisprudence recognized wherever the common law has made its way, and reaffirmed by our statute law, that in criminal prosecutions the guilt of the defendant must be proven beyond a reasonable doubt. But how can this instruction be harmonized with this rule? Can it be said if the jury have a reasonable doubt whether the defendant was justifiable or not, or whether there were circumstances sufficient to reduce the crime to manslaughter, that they are satisfied of his guilt beyond a reasonable doubt. How is it possible to have a reasonable doubt whether a certain fact exists or not, and still be satisfied beyond a reasonable doubt that it does exist? Now if the jury in this case had a reasonable doubt whether there were circumstances sufficient to reduce the crime of which the defendant is accused to manslaughter, how could they be satisfied beyond a reasonable doubt that he was guilty of murder? These two states of mind are as incompatible as light and darkness, or doubt and absolute certainty upon the same proposition.

If all reasonable doubts must be resolved in favor of the defendant, what is the difference whether these doubts be raised by the

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evidence for the State or the defendant? There certainly can be none: the letter as well as the spirit of the law makes it incumbent upon the prosecution to establish his guilt beyond a reasonable doubt. The statute, it is true, declares that when the homicide is proven by the State, and no circumstances of mitigation, excuse, or justification are shown, the burden of establishing such mitigation, excuse, or justification devolves upon the defendant; but nothing is said about the degree of proof necessary to be adduced by him to maintain his defense. He is not required to establish the facts constituting his defense beyond a reasonable doubt, (*People v. McCann*, 16 N. Y. 58; *People v. Coffman*, 24 Cal. 230); nor by evidence preponderating over that produced against him by the State: but only to raise such doubt in the mind of the jury that they cannot be satisfied of his guilt beyond a reasonable doubt. An instruction, substantially like this, was after a very thorough consideration held erroneous by this Court in the case of *The State v. Waterman*, (1 Nev. 543). It was said in that case, that perhaps the same rule would not apply in cases of homicide; however, we can see no reason why it should not, nor why the reasoning in that case should not apply here. The conclusion attained in that case, and the views here expressed, are fully borne out by many very respectable authorities: (*The State v. Bartlett*, 43 N. Hamp. 224; *Hopps v. The People*, 31 Ill. 385; *French v. The State*, 12 Ind. 670; *Hall v. The State*, 8 Ind. 439; *Commonwealth v. McKie*, 1 Gray, 61.) This portion of the instruction is therefore erroneous. Nor do we think the defendant is required to establish his defense to the satisfaction of the jury by *preponderating* proof, if by it is to be understood proof outweighing that on the part of the prosecution. Such is certainly the idea which the instruction naturally conveys. By preponderating evidence, as usually used, is meant evidence outweighing the evidence opposed. The jury in this case must have understood from this portion of the instruction that they could not acquit, unless the proof introduced by the defendant to establish mitigating circumstances outweighed the proof of a deliberate purpose to kill, and the presumption of malice resulting therefrom as made out by the State. Such is not the correct rule of evidence. What has already been said will apply with equal force

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to this last portion of the instruction—for if it be sufficient that the defendant's evidence raise a reasonable doubt of his guilt, or rather if it be such that his guilt is not established beyond a reasonable doubt, he must be acquitted—he is certainly not required to prove his defense by preponderating evidence. Upon principle, surely, he cannot be. Nor are we without authority to support these views, as will be seen by an examination of the cases last referred to. In *The State v. Bartlett* the question here considered was very ably discussed, and the proposition embodied in this instruction very clearly shown not to be the correct rule of law. In *Hopps v. The People*, which was a prosecution for murder—the defense being that of insanity—the lower Court charged the jury, that if the act was proven to their satisfaction by the weight and preponderance of evidence, to have been one of insanity only, the prisoner was entitled to an acquittal, though the defense be not proved beyond all reasonable doubt. This charge, which is certainly more favorable to the prisoner than that in this case, was held incorrect—the majority of the Court holding, that the defendant was not required to establish his defense by preponderating evidence. So in *Hall v. The State*, the jury were instructed thus: “If the property stolen, or a portion of it, was found in the possession of the defendant in a short time after the larceny was perpetrated, it would be your duty to find the defendant guilty, unless he satisfies you, from the evidence, that he came by the horse honestly.” Upon this the Appellate Court say: “This instruction, as a general proposition, was incorrect. The Court should have told the jury that ‘they might’ instead of that ‘they should’ find the defendant guilty.. See a correct instruction on this point, in *Engleman v. The State*, (2 Ind. 91)—*except as to the modification we now append to the second branch of the one under consideration, which is that the defendant was not bound to satisfy the jury that he came honestly by the possession of the property alleged to be stolen; but only to go so far as to raise a reasonable doubt whether he had not so come by it—for in criminal cases the jury must acquit upon a reasonable doubt.*” *French v. The State* was a prosecution for murder. Upon the trial the jury were instructed, that “evidence which tends to establish the defendant's guilt, also tends in an equal degree to prove that he was

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present at the time and place when and where the deed was committed. And if he seeks to prove an *alibi*, he must do it by evidence which outweighs that given for the State, tending to fix his presence at the time and place of the crime." Of this the Appellate Court say: "This instruction is not in accordance with the general rule of law, as applied either in civil or criminal cases—for in the former the defendant is not bound to produce evidence which outweighs that of the plaintiff. If he produces evidence that exactly balances it so as to leave no preponderance, he defeats the suit against him."

And in criminal cases the rule is, that if the defendant produces evidence which raises a reasonable doubt of the truth of the charge against him, he must be acquitted. And this doubt may arise upon the whole of the evidence in the case. "Neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient to convict, unless it generate full belief of the fact of guilt to the exclusion of all reasonable doubt.

There are dicta, and some decided cases admittedly opposed to these views, however we think them fully supported both by principle and the weight of authority. But, so far as this case is concerned, we might admit that the rule as laid down in *Commonwealth v. York*, (9 Met. 93) which is referred to as a leading case in opposition to our opinion without changing the conclusion here arrived at, for, it will be seen, the rule of that case is strictly limited to those cases where the killing is proven by the prosecution to have been committed by the defendant, and nothing further is shown. (*Commonwealth v. Hawkins*, 3 Gray, 463.) But it is conceded by the same Court, that in a case where any evidence whatever is developed by the prosecution tending to mitigate, excuse, or justify the killing, or in any wise to establish a defense, the doctrine of York's case has no application. Such was the holding in *The Commonwealth v. McKie*, (1 Gray, 61) a decision, it appears to us, directly supporting the views we have expressed, when applied to a case like this, where the facts and circumstances constituting the defense were developed by the prosecution. In that case McKie was indicted for an assault and battery on one Eaton with a dangerous weapon. The evidence on the part of the Commonwealth tended to show that the defendant struck Eaton with a dan-

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gerous weapon in the manner charged in the indictment ; and also that Eaton had spit in the face of the defendant immediately before the striking. The defense was justification, because of the insult offered him. The Appellate Court, although expressly stating that the evidence for the defendant constituted no justification, and saying that the jury should have been instructed that the defendant had not established his defense, and that he was liable to be convicted of the offense charged against him, yet reversed the case because the Court below refused to charge them "that if on all the evidence they were satisfied of the beating, but were left in reasonable doubt whether the beating was justifiable, they should acquit the prisoner." In delivering the opinion of the Court, Judge Bigelow says: "But further, the rule of the burden of proof cannot be made to depend upon the order of proof, or upon the particular mode in which the evidence in the case is introduced. It can make no difference, in this respect, whether the evidence comes from one party or the other. In the case supposed, if it is left in doubt, on the whole evidence, whether the act was the result of accident or design, then the criminal charge is left in doubt. Suppose a case where all the testimony comes from the side of the prosecution. The defendant has a right to say that upon the proof, so introduced, no case is made against him, because there is left in doubt one of the essential elements of the offense charged, namely, the wrongful, unjustifiable, and unlawful intent. The same rule must apply where the evidence comes from both sides, but relates solely to the original transaction constituting the alleged criminal act, and forming part of the *res gestæ*."

"Even in the case of homicide, where a stricter rule has been held as to the burden of proof than in other criminal cases, upon peculiar reasons applicable to that offense alone, it is conceded that the burden is not shifted by proof of a voluntary killing, where there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide." (*Commonwealth v. York*, 9 Met. 116; *Commonwealth v. Webster*, 5 Cush. 305.)

All the circumstances of the killing were shown by the evidence on the part of the prosecution in this case ; hence it was error to

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charge the jury that it was incumbent on the defendant to satisfy them by a preponderance of evidence of the existence of the facts constituting his defense. He had the right to claim the benefit of any reasonable doubt upon a consideration of all the evidence.

Judgment reversed and new trial ordered.

THE STATE OF NEVADA EX REL. JOHN FORD, APPELLANT, v. JACOB A. HOOVER, RESPONDENT.

ACKNOWLEDGMENTS BY COUNTY RECORDERS. An acknowledgment of a certificate for the constructing and maintaining of a toll road under the Act of 1865, (Stats. 1865, 254) taken before a County Recorder, is sufficient.

CONSTRUCTION OF STATUTES—"RECORDERS." The Act of 1861, (Stats. 1861, 422) authorizing "Recorders" within their respective counties to take acknowledgments, referred to County Recorders, and not to Judicial Recorders—officers not then known to the laws.

CONSTRUCTION OF STATUTES—POWER OF RECORDERS TO TAKE ACKNOWLEDGMENTS. The fact that the Act of 1865 (Stats. 1864-5, 110, Sec. 63) authorizes Judicial Recorders to take acknowledgments of conveyances, does not take away a like power conferred on County Recorders by the Act of 1861. (Stats. 1861, 422.)

ON PETITION FOR REHEARING: CONSTRUCTION OF STATUTES—ACKNOWLEDGMENTS BY RECORDERS. The Act of 1867, (Stats. 1867, 103) providing that acknowledgments within the State shall be taken by certain officers, and not mentioning County Recorders among them, being simply an Act amendatory of a like Act of 1861, (Stats. 1861, 11) did not take away from County Recorders the power to take acknowledgments conferred upon them by the Practice Act of 1861. (Stats. 1861, 422.)

STATUTES IN PARI MATERIA SHOULD BE CONSTRUED TOGETHER. Statutes relating to the same subject matter which can stand together should be so construed as to make each effective.

APPEAL from the District Court of the Third Judicial District, Washoe County.

This was an information filed in the Court below on September 21st, 1868, on behalf of Ford against Hoover, who was in possession and receiving the tolls of the road in controversy. It is a road in Washoe County, beginning on the Ophir Grade Toll Road, near New York Mill, at the north end of Little Washoe Lake, and run-

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ning thence southerly to the Lake View House, on the line between Washoe and Ormsby counties, and known as the "Washoe Valley Extension and Branch Toll Road." Other facts are stated in the opinions.

Robert M. Clarke, for Appellant.

The County Recorder had authority to take acknowledgments. (Stats. 1861, 422, Sec. 636.) The Recorder mentioned in the section cited is without doubt the County Recorder. The language is susceptible of no other interpretation. But if any doubt exists it is removed by reference to the statutes of California, from which the section is copied. (Cal. Stats. 1853, 287, Sec. 107.)

The certificate was good under the Act of March 8th, 1865, (Stats. 1864-5, 254) and should have been admitted in evidence.

T. D. Edwards, for Respondent.

The principal point at issue in this case is whether or not a County Recorder had, in 1868, the power to take and certify acknowledgments of conveyances of real property and other written instruments.

The first legislation upon the subject was in an Act approved November 5th, 1861, (Stats. 1861, 11) in which no such power is given to the County Recorder.

The Act of 1861 (Stats. 1861, 422, Sec. 636) provides that: "The Judges of the Supreme Court, of the District Courts, and of the Probate Courts, shall have power in any part of the Territory, and Justices of the Peace and Recorders, within their respective counties, shall have power to take acknowledgments," etc.

The Legislature must have intended the word "Recorder," as used in this connection, to refer to and mean a Recorder of a Court, and not a County Recorder. The section does not refer to a Clerk of any Court, or a Notary Public; it only refers to Courts and Judges—to the presiding officers of Courts. The word "Recorder," therefore, as used in connection with Judges of other Courts, is clearly intended to refer to Recorders of Courts, and not County Recorders.

Again: The statute of Nevada Territory of 1861, creating the

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Territorial office of County Recorder, was wholly repealed in 1866. (Stats. 1866, 250, Sec. 101.) Could a County Recorder, subsequent to the repealing Act of 1866, have any power given him by a Territorial statute only, when the Territorial Act which created the office had no existence? Did a County Recorder, subsequent to said Act of 1866, have any power, except that conferred on him by the statutes of the State of Nevada?

Again: In the Act of 1865, relating to conveyances, the power to take acknowledgments is clearly denied County Recorders. (Stats. 1865, 118.)

Again: In 1867 (Stats. 1867, 103) an Act was passed defining, in strong language, who shall take acknowledgments, and County Recorders are not named. They are therefore excluded, and can not take acknowledgments.

By the Court, LEWIS, C. J.:

The first section of an Act of the Legislature, entitled "An Act to provide for Constructing and Maintaining Toll Roads and Bridges," (Stats. 1865, 254) declares that "any person or persons desiring to construct and maintain a toll road within any one or more of the counties of this State, shall make, sign, and acknowledge, before some officer entitled to take acknowledgments of deeds, a certificate, specifying: First, the name by which the road shall be known; and, second, the names of the places which shall constitute the termini of said road. Such certificate shall be accompanied with a plat of the route of the proposed road, and shall be recorded in the office of the County Recorder of the county or counties within or through which said road is proposed to be located; and the record of such certificate and plat shall give constructive notice to all persons of the matters therein contained. The work of constructing such road shall be commenced within thirty days from the time of making the certificate above mentioned, and shall be continued with all reasonable dispatch until completed." In accordance with this law, Ford had a certificate and plat recorded in the proper county, and proceeded with the construction of his road. But Hoover, who afterwards claimed the right to build a road upon the same route, contends that the County Recorders

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of this State have no authority to take acknowledgments ; and as the acknowledgment of the plaintiff's certificate was taken by the County Recorder of Washoe County, it was not legally acknowledged, therefore that the requirements of the law in this respect were not complied with.

Whether County Recorders have such authority or not is the only question now to be determined. Section six hundred and thirty-six of the Statutes of 1861, provides among other things that Justices of the Peace and Recorders within their respective counties shall have power to take acknowledgments. But as this section is found under the title "Miscellaneous provisions respecting Courts and Judicial officers," it is argued that the Recorders referred to in this section, are the judicial officers known by that name. The objection to this position however is, that there was no Judicial Recorder known to the laws of the Territory at the time this authority to take acknowledgments was given, but County Recorders were, and their duties and responsibilities were fully defined. It may be inferred from this that the latter officers were referred to, as it cannot be supposed the Legislature conferred authority and power upon officers entirely unknown in the Territory, and nowhere recognized by its laws. If this statute is to have force and vitality it must be held that the Recorders referred to are the county officers known as such. A further reason in favor of the conclusion that these latter officers were referred to, and the authority to take acknowledgments was given to them, is the fixing by the Territorial Legislature of their fees for taking acknowledgments. (Stats. 1861, 247.)

Section sixty-three of the Statutes of 1864-5, page 118, we do not think in anywise affect this question ; undoubtedly, the Recorders there referred to are Judicial Recorders ; but to confer the power of taking acknowledgments on these latter officers, cannot nor does not seem to have been the purpose to deny that right to the County Recorders. This section is not an amendment of, nor does it supercede, section six hundred and thirty-six of the Statutes of 1861. For these reasons we conclude that the authority to take acknowledgments was by the law referred to, given to the County Recorders of the Territory, and as that law is still in force,

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it follows that the acknowledgment to the plaintiff's certificate was properly taken.

Judgment below reversed, and cause remanded.

By JOHNSON, J., dissenting :

In February, 1868, Ford, the relator, and appellant here, with intent to secure the right to construct a certain toll road under the provisions of the general law regulating toll roads and bridges, approved March 8th, 1865, (Stats. 1864-5, 254) made the certificate contemplated by section one of said Act, and acknowledged the same before the County Recorder of Washoe County. This process was repeated in August, 1868. These certificates were made of record in said county.

On the trial in the Court below, the certificates being offered in evidence on the part of the plaintiff, were objected to on the ground that the County Recorder, at the times above stated, had no authority to take acknowledgments of such instruments. The objection being sustained, the case on appeal presents the single question whether the County Recorder had authority to take acknowledgments of deeds ; for to render such a certificate valid by the provisions of section one of the Act referred to, the party "shall make, sign, and acknowledge the same, before some officer entitled to take acknowledgments of deeds."

On behalf of appellant it is claimed that power was given County Recorders to take acknowledgment of deeds, etc., by section six hundred and thirty-six of the Practice Act. To this view of the question I am much inclined, and if the proposition depended solely on a construction of that section, I would probably adopt that view of it. But has not a later enactment superceded the authority of that statute ? Admit that on the twenty-ninth of November, 1861, County Recorders, under section six hundred and thirty-six, could take acknowledgments of deeds, how stood the matter when, by the law of March 11th, 1867, (Stats. 1867, 103) it was provided that "the proof or acknowledgment of every conveyance affecting any real estate, shall be taken by some one of the following officers: First, if acknowledged or proved within this State by some Judge or Clerk of a Court having a seal, or some Notary Public or Justice of the Peace." * * *

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This law was in force, and in my view none other, regulating the matter of acknowledgments taken *within the State* when these certificates were made. It was subsequent in point of time to the enactment of 1861, under which the power of the County Recorder to do this thing is claimed, and if conflicting with a former Act, upon all known principles of construction must be held the superior and prevailing law. The law-making power, on the eleventh of March, 1867, had declared that "the proof or acknowledgment of every conveyance affecting any real estate *shall be taken* by some one of the following officers, etc., among which are not enumerated County Recorders. This in itself is a positive inhibition on such officers exercising such powers, after the date of its approval, unless covered by subsequent enactments, which perhaps the recently amended Practice Act has done, which however is of later date than the matters involved in this appeal.

In my opinion the judgment of the District Court should be affirmed.

On petition for rehearing—By the Court, WHITMAN, J.—LEWIS, C. J., concurring:

Upon petition for rehearing by respondent, it is insisted, that the statute of March 11th, 1867, is conclusive of this case, and that the language there used, as follows: "The proof or acknowledgment of every conveyance affecting any real estate, shall be taken by some one of the following officers." * * * Among whom County Recorders are not mentioned, inhibits such officers from taking acknowledgments affecting any real estate.

It will be seen, upon examination, that the statute relied on is simply amendatory of the "Act concerning Conveyances," approved November 5th, 1861; that the amendment touches entirely other matters than the point here presented; and that as to such question, the language of the original and amended statutes is identical. Both the statutes upon which the opinion of this Court was based, were passed subsequently to that of November 5th, 1861, having been approved November 29th, 1861, and in the judgment of the Court, all can and should stand and be construed together, so as to make each effective.

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If this view be correct, it cannot be shaken by the amendment of 1867, which, as has been stated, has not altered the law. Seeing, therefore, no reason for change in the original judgment, a rehearing is denied.

JOSEPH M. DOUGLASS *et al.*, RESPONDENT, v. THE
MAYOR AND BOARD OF ALDERMEN OF VIR-
GINIA CITY, APPELLANTS.

PROMISSORY NOTES OF VIRGINIA CITY. The City of Virginia, by its Mayor and Board of Aldermen, having taken a lease of certain rooms for the accommodation of its Common Council, at a rental of two hundred dollars per month, and having agreed in the lease if the rent were not paid as it fell due, to execute its promissory notes therefor, bearing interest at five per cent. per month; and its notes having been accordingly executed in regular form; and it being admitted that it had the power to take a lease: *Held*, that it had the power to execute the notes as a means of carrying out the power of taking a lease.

INCIDENTAL POWERS OF MUNICIPAL CORPORATIONS. A municipal corporation, like a trading one, may, unless in some way restrained by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it, such as incurring debts, executing and giving promissory notes, and adopting all the ordinary or usual means which may be necessary to the full exercise, enjoyment, and discharge of its powers expressly given.

CONSTRUCTION OF CHARTER OF VIRGINIA CITY—CONTINGENT FUND. The Charter of Virginia City (Stats. 1864, 55; Sec. 23, Sub. 18) provides, that "the Common Council shall not authorize the issuance of, nor shall any city officer issue, any scrip or other evidence of debt or order on the Contingent Fund, unless there be actually cash in the treasury to meet the order or warrant so drawn": *Held*, that the restriction here imposed applied solely to the Contingent Fund, and did not prevent the city from issuing, in proper cases, its promissory notes or other evidences of indebtedness drawn on the General Fund, without regard to cash in the treasury.

INTEREST ON INDEBTEDNESS OF VIRGINIA CITY. The fact that a provision of the charter of Virginia City (Stats. 1864, 55, Sec. 23, Sub. 21) limits the interest to be paid on certain bonds therein authorized to be issued to twelve per cent., does not by implication deny the right to pay a higher rate of interest upon any other character of indebtedness, but, on the contrary, by limiting the rate to be paid on one peculiar kind of paper admits the presumption that upon all other kinds no limitation was intended.

APPEAL from the District Court of the First Judicial District,
Storey County.

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This action was commenced on April 21st, 1868, to recover the sum of five thousand four hundred and eighty dollars and eighty-three cents, principal and interest, on eight promissory notes, and a bill for furniture, sold and delivered, and accruing interest on the principal sum of one thousand eight hundred and twenty-four dollars and sixty cents, at the rate of five per cent. per month. The notes were all of the same general character as the first, which was as follows :

“ \$200.00.

VIRGINIA, N. T., September 5th, 1864.

“ Thirty days after date, for value received, the City of Virginia promises to pay to Geo. F. Jones & Co., or order, two hundred dollars (for one month's rent of council room to date) with interest from date until paid at the rate of five per cent. per month, payable monthly ; both principal and interest payable in United States coin only.

{ U. S. Int. Rev. stamp, }
{ 10 cents, canceled. }

R. E. ARICK, Mayor.”

At the time the notes were given the firm of Geo. F. Jones & Co., the payee, consisted of George F. Jones, Joseph M. Douglass, and Luke B. Richardson. Afterwards the firm dissolved, and Jones assigned all his interest to his former copartners, by whom this suit was instituted. Judgment was rendered in accordance with the prayer of the complaint and the defendants appealed.

Mesick & Seely, for Appellants.

We do not deny the power of the Mayor and the Board of Aldermen of Virginia City to make the contract of lease, and subject the city to the payment of the indebtedness created thereby. What we do deny is, that after making the contract of lease and creating the debt thereunder, the city authorities, under the charter of 1864, had any power to change the form of that indebtedness, so as to make it more burdensome to the city, or do aught else in respect to it than make provisions for its payment. The liability of the city, upon the lease for the rent, was perfect. The giving of the notes in no way seems incidental or necessary to the leasing of necessary buildings for the use of the city. They did

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not pay the rent. They subserved no purpose except that of voluntarily increasing the burdens of the city, and giving an advantage over other city liabilities.

Whatever may be its defects and inconsistencies, the city charter of 1864 clearly evinces the design of having the affairs of the city administered on a cash basis and economically, as well as of imposing severe restraint upon the authority of city officers to swell the city debt beyond the charter limits. This object could not be secured, and so the Legislature must have seen, by paying high rates of interest for delays to which creditors to the city might be subjected; and for this reason, doubtless, was inserted in the charter the last clause of subdivision eighteen of section twenty-three. Moreover, it seems plain, from subdivision four of section twenty-three, that the city officers were restricted from pledging the city to the payment of interest, except upon the bonds specified in that subdivision. For these reasons we submit, that the promissory notes in question are in violation of the restriction imposed upon the city officers by the charter.

As to the fact of there being money in the treasury at the time these notes were given, the burden of proof was on the plaintiffs to show it, because they were bound to know that the act of giving the notes was within the scope of the authority of the city officers, and by the terms of the charter such authority was prohibited, except on condition of the money being in the treasury.

Williams & Bixler, for Respondent.

The power of corporations, municipal or public, as well as private, to make contracts and incur debts in the prosecution of their legitimate business, and to give their promissory notes, is firmly established—not only by universal practice, but by repeated judicial decisions. The power to contract, when given by charter, carries with it all the incidents of fixing the terms of the contract, making proper evidence of it, and executing all the necessary obligations and writings stipulating for its performance. (*Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620; *The People v. Brennan*, 39 Barb. 545; *Ketchum v. The City of Buffalo and Austin*, 14 N. Y. 856; *Tucker v. Mayor, etc.*, 4 Nev. 20.)

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The next inquiry is: Whether the council was prohibited from complying with that part of its contract which provided for the issuance of the notes of the city. We do not understand it to be claimed, that the notes were void on the ground of being issued at a time when there was no money in the treasury to meet them; but, inasmuch as "warrants" and "orders" only are mentioned in the concluding clause of subdivision eighteen of section twenty-three of the city charter, as the "evidences" of debt which might be issued by authority of the council, that therefore they were the *only* evidences or forms of obligations which might be issued. It will be observed, however, that the "orders," "warrants," and "evidences of debt," mentioned in the subdivision, refer exclusively to those payable out of the *contingent fund*. No other construction can grammatically be given to it; and if the Legislature intended to extend it further, it indulged in a very unnecessary use of language—for if it had been intended to embrace all of the funds, then the expression "on the contingent fund" was unnecessary.

The next objection to our notes, and against a rate of interest greater than ten per cent. per annum, is alleged to be found in subdivision twenty-one of section twenty-three of the charter. But a complete answer to this objection is found in the fact that subdivision twenty-one, as well as subdivisions twenty-two and twenty-three, relate entirely to time bonds or scrip in the sum of one hundred thousand dollars, to be sold to the highest bidder under seal, and which have no relation whatever to the ordinary course of business of the city. It was doubtless intended that those time bonds should be converted into money with which to pay off old indebtedness, and put the affairs of the city on a cash basis. It will be observed also, that the Council was authorized to issue bonds in that sum, "over and above the revenue of the city"—while the previous subdivisions, relating to the ordinary transactions of the city, limit the liabilities to be incurred to its "estimated annual revenue."

By the Court, LEWIS, C. J.:

On the twelfth day of April, A.D. 1864, the City of Virginia, by its Mayor and Board of Aldermen, leased of the plaintiffs certain

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rooms in the city for the accommodation of its Common Council, agreeing to pay therefor a monthly rental of two hundred dollars in gold coin. The parties to this lease knowing that the city would probably not be able to pay the rent as it became due, incorporated in the instrument a provision to this effect: That the notes of the city, bearing interest at the rate of five per cent. per month, payable monthly, should be considered and received by the lessors as equivalent to cash. As anticipated, the money was not paid as it became due; consequently, in accordance with this provision of the lease, the notes here sued on were executed in regular form and delivered to the plaintiffs. To the complaint, fully setting out these facts, the city interposed a general demurrer, taking the ground that the corporation, although having the power to enter into the lease, (a fact which is here admitted) had no right or authority to execute these notes. This demurrer was overruled by the Court, and no answer being filed within the time granted for that purpose, judgment was rendered for the plaintiffs in accordance with the prayer of the complaint. From that judgment, and an order subsequently made refusing to correct it, this appeal is taken, the same points, and those only, being made here as in the Court below.

That a municipal, like a trading corporation, may, unless in some way restricted by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it—incur debts and execute and give promissory notes in the discharge of its legitimate powers; or, in other words, that it has the right to adopt all the ordinary or usual means which may be necessary to the full execution or enjoyment of the power expressly given by its charter, is so firmly established by the authorities that at the present day it may be considered an elementary principle of the law of corporations. (*Ketchum et als. v. The City of Buffalo*, 4 Kernan, 356.) It is admitted that the taking of the lease and the agreement to pay the specified rent, were strictly within the authority conferred upon the defendant, but it is objected that it had no right to give its promissory notes bearing interest for the rent as it became due, counsel arguing that if it had the authority to issue any evidence of indebtedness whatever, it was confined to ordinary warrants or scrip, which upon their face bear no interest. We find nothing in the

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Act incorporating the defendant restricting it to the issuance of any particular kind or character of paper as evidence of its indebtedness. It is true, in the absence of special contract to the contrary, the proper course and the one usually pursued, is to issue a warrant on the treasury for money payable by the city. However, as in this case it was expressly agreed by the defendant that promissory notes, bearing a certain rate of interest, should be issued to the plaintiffs instead of the ordinary warrants; that agreement should be fully upheld, unless it be found that the defendant had not the authority to make it. Why, it may be very properly asked, if it had the authority to lease the rooms and contract to pay rent for them at the rate of two hundred dollars a month, had it not the right to agree that the rent, if not paid when due, should draw interest and be evidenced by a promissory note? Under the rule already announced it certainly had that right, if not in some way restrained by the law of its creation, for the giving of the notes was an ordinary means employed for carrying out a power expressly conferred. Having the authority to lease, it had the right to adopt all the usual means necessary to the complete execution of such authority. In *Ketchum v. The City of Buffalo* it was held that the power to "regulate and establish markets" gave to the city the power to purchase market grounds on credit, and to execute its bond, bearing interest at seven per cent. per annum, for the purchase money. We can observe no difference upon principle between that case and this. If the power to establish and regulate markets conferred the right to purchase grounds for that purpose and to execute an interest-bearing bond for the purchase money, so it would seem, upon like reasoning, would the power to rent rooms or buildings for the use of the city authorize the issuance of interest-bearing promissory notes for the rent as it becomes due.

But it is argued for the city that section twenty-three of the charter in fact prohibits it from issuing any evidence of indebtedness whatever unless there was money in the treasury to meet it; and it is not claimed that there was at the time these notes were executed. This conclusion it is claimed is warranted by the last clause of subdivision eighteen of the section which is in this language: "The Common Council shall not authorize the issuance of,

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nor shall any city officer issue any scrip or other evidence of debt, or order on the Contingent Fund, unless there be actually cash in the treasury to meet the order or warrant so drawn."

It appears to us this language simply prohibits the issuance of orders or scrip on the Contingent Fund alone, whilst the city was left at liberty to issue such evidences of indebtedness, or any other kind on the General Fund of the treasury—that is, that the restriction here imposed applies solely to one fund of the treasury—the contingent. Such certainly seems to be the fair and grammatical construction of this clause of the section. If it were intended to make this prohibition apply to the entire treasury or all the funds, why mention the Contingent Fund and not the others? By the arrangement of the language "scrip" and "other evidence of indebtedness," are as clearly confined to the "Contingent Fund" as the word "order"—that is, scrip or other evidence of debt could no more be issued upon the Contingent Fund than an order. That the words "scrip or other evidence of debt" applies to the treasury generally, and that an order only is prohibited from being issued against the Contingent Fund, thus leaving the defendant free to issue any evidence of debt upon that fund except an *order*, is in our opinion a proposition which cannot be satisfactorily maintained upon the words of the statute. If the words "scrip or other evidence of debt," like the word "order," have reference to the Contingent Fund, they do not apply to any other; but if they do not, it must follow that any kind of evidence of debt could be issued against that fund, except such as might be strictly called an order—a proposition which we hardly think will be contended for by counsel. The Legislature having clearly expressed its purpose, and there being no ambiguity in the language, it is not for the Courts to inquire why the restriction is confined to the Contingent Fund alone. To restrict the prohibition to that particular fund may appear to convict the Legislature of doing a foolish act, but there may have been a very wise and good reason for it, nevertheless, not apparent to us. However, it is not certain that we should not be as reluctant to convict that body of doing an unwise or useless act, as of utter inability to express its intentions in grammatical English. We conclude upon this point that the prohibition is

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exclusively confined to the Contingent Fund, and as the notes here sued on were not drawn on or made payable out of that fund they were not improperly issued.

Again: It is argued, that as the twenty-first subdivision of the section already referred to limits the interest to be paid on certain bonds therein authorized to be issued to twelve per cent., it is by implication a denial of the right to pay a higher rate upon any other character of indebtedness. The correct rule of interpretation, we think, authorizes an entirely different conclusion. The Legislature having limited the amount of interest to be paid on one peculiar character of paper authorized to be issued by the city, it must be presumed that upon all other kinds no limitation was intended. Such is certainly the rule generally adopted, and we see no reason why it should not apply here.

The judgment must be affirmed.

EX PARTE J. J. HILL ON HABEAS CORPUS.

HABEAS CORPUS—RIGHT TO ISSUE WRIT. A State Court or Judge, duly authorized by the laws of the State, may issue the writ of habeas corpus in any case where a party is imprisoned within its territorial limits, provided it does not appear when the application is made that the person imprisoned is in custody under the authority of the United States.

DUTY OF OFFICER TO MAKE RETURN TO WRIT. It is the duty of any person having the custody of a prisoner to make known by a proper return to a Court or Judge issuing a writ of habeas corpus to him, the authority by which he holds such person in custody; and this duty applies to a United States Marshal in response to a writ from a State Court or Judge.

STATE COURTS NOT TO INTERFERE WITH JURISDICTION OF UNITED STATES COURTS. In every case where process regular upon its face has been issued from a United States Court having power to issue process of such a nature, the officer while acting thereunder is fully protected against any interference from a State Court; and such State Court, when judicially informed of the existence of the process, cannot go behind the same to make any further inquiry.

PRESUMPTIONS IN FAVOR OF PROCEEDINGS OF UNITED STATES DISTRICT COURT. A District Court of the United States has the power to find, through its grand jury, an indictment for any offense within its jurisdiction; and as to any matter

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within such jurisdiction, it is not an inferior Court; and the presumptions are in favor of the regularity of its proceedings.

STATE JURISDICTION ON HABEAS CORPUS AS TO OFFENSES AGAINST THE UNITED STATES. A State Court or Judge cannot on habeas corpus examine or decide whether a particular offense charged in an indictment, found in a United States Court, is or is not an offense against the laws of the United States.

JUDICIAL NOTICE OF LAWS OF THE UNITED STATES. State Courts take judicial cognizance of the laws of the United States without formal proof of them, and are bound thereby.

THIS was an original proceeding before the Supreme Court. The facts are stated in the opinion.

By the Court, WHITMAN, J. :

The petitioner in this case alleges his illegal detention by R. V. Dey, United States Marshal for the District of Nevada, who makes return that he holds petitioner by virtue of a bench warrant issued from the District Court of the United States for said District, which warrant is made part of his return, as follows :

“ UNITED STATES OF AMERICA, } ss.
District of Nevada, }

“ To the Marshal of the United States of America for the District of Nevada, and to his deputies, or any or either of them—
Greeting :

“ Whereas, at a District Court of the United States of America, begun and held at Virginia City, Nevada, within and for the district aforesaid, on the first day of February, in the year of our Lord one thousand eight hundred and sixty-nine, the grand jurors in and for the said District of Nevada brought into the said Court a true bill of indictment against * * * J. J. Hill and * * * charging them with the crime of a violation of the treaty between the Empire of China and the United States of America, as by the said indictment now remaining on file and of record in the said Court may more fully appear, to which indictment the said persons herein named have not yet appeared or pleaded :

“ Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said persons herein named, and bring them before the said Court at

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the United States District Court Room in Virginia City, to answer the indictment aforesaid, on the thirty-first day of May, A.D. 1869, at eleven o'clock, A.M.; or, if they require it, that you take them before the Judge of the United States District Court, District of Nevada, or any Commissioner of the United States, within and for the District of Nevada, that they may give bail in the sum of one thousand dollars each to answer the said indictment.

“Witness the Hon. Alex. W. Baldwin, Judge of the said District Court thereof, at Virginia City, Nevada, this thirtieth day of April, A.D. 1869.

[L.S.]

R. M. DAGGETT, Clerk.”

It is conceded that upon the petition presented, this Court properly issued its writ, and the only contest arises upon the effect of the Marshal's return. Many varied and able decisions have been rendered on similar questions by State Courts, but it is unnecessary to review their arguments or the positions therein taken, from the fact that the Supreme Court of the United States has pronounced an authoritative rule upon the matter.

In the cases of *Ableman v. Booth* and *United States v. Booth*, (21 How. 506, considered together) after careful elaboration of reasoning upon the several provinces and powers of the State Courts and those of the United States, the conclusion deduced is thus summed up: “We do not question the authority of a State Court, or Judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear when the application is made that the person imprisoned is in custody under the authority of the United States. The Court or Judge has a right to inquire in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the Marshal or other person having the custody of the prisoner, to make known to the Judge or Court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus; and the duty of the officer to make a return, grows necessarily out of the complex character of our government; and the

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existence of two distinct and separate sovereignties within the same territorial space—each of them restricted in its powers, and each within its sphere of action prescribed by the Constitution of the United States, independent of the other. But after the return is made, and the State Judge or Court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress.”

The only possible room for doubt as to the exact meaning of the quotation is as to the words “authority of the United States,” which language is to some extent criticised in *Ex parte McCahey*, (Am. Law Rev., Jan. 1869, 347); but there would seem to be no opportunity to misunderstand its intention when the last sentence as above quoted is considered, or when the following language immediately connected is read: “And although, as we have said, it is the duty of the Marshal, or other person holding him, to make known by a proper return the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State Judge or Court upon a habeas corpus issued under State authority. No State Judge or Court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the Marshal, or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call

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to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the Court or Judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

To sustain its conclusions the Court must mean to say, that in every case where process, regular on its face, has been issued from a Court of the United States having power to issue process of such a nature, the officer acting thereunder is fully protected against any interference from a State Court, while so acting; and that such Court, when judicially informed of the existence of the process, cannot go behind the same to make any further inquiry.

In the present case, it must be admitted that the United States District Court has full power to issue a bench warrant for the arrest of a party upon an indictment found by a grand jury regularly convened by such Court; nor can it be denied that the process is good in form: but it is contended that it is void, for the reason that it is based upon and refers to an indictment formally found, but found for a pretended offense which is claimed to be no offense against any law of the United States—hence, it is demanded that this Court discharge the petitioner. But it does not follow that the failure to charge a statutory offense in an indictment renders the process issued thereon void; and were that so, still to take the course requested would be to act in direct conflict with the principle of the cases cited.

A District Court of the United States has the lawful power to find, through its grand jury, an indictment for any offense within the jurisdiction of the District or Circuit Court; exclusive power to try certain cases; and concurrent jurisdiction with the Circuit Court, of all crimes and offenses against the United States, the punishment of which is not capital. Such Court, although limited in power, is not an inferior Court as to any matter within its jurisdiction; and when its indictment has been found in any given case, the presumption is that it was so found within its jurisdictional scope; and any attempt on the part of a State Court in a pro-

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ceeding of this kind, to examine and decide the fact whether a particular offense charged is or not an offense against the laws of the United States, would be an usurpation of that very jurisdiction, which is exclusive in Courts of the United States, and an assumption of its vital premise. To such inquiry there is no limit: the impropriety rests not in the decision of the State Court, but in the undertaking. If in this case inquiry can be made, and examination had behind the process of which this Court has been judicially informed, it may in all.

If in this case a State Court could decide, that no law of the United States exists upon which an indictment can be based—in another it might, with equal propriety, hold that a law existent was unconstitutional, or that no proper grand jury had been assembled, or that the indictment did not well charge a recognized crime. In fact, the writ of habeas corpus would be turned into general or special demurrer to the proceedings of the Courts of the United States. Such is not its province; and a State Court goes out of its proper sphere, when it attempts to interfere with the action of an officer of the United States under judicial process, regular in form, issued upon the ordinary proceedings of a Court having jurisdiction of a class of offenses against the United States, of which the immediate crime charged is claimed, or purports, to be one.

All citizens of the United States are bound to know the laws thereof, and State Courts take judicial cognizance of such, without formal proof, and are "*bound thereby*"; but to decide whether any particular statute of the United States is or is not existent—or, if existent, valid or invalid—requires investigation and determination, the exercise of which, in a proceeding like the present as against the process of a Court of the United States, is not only uncalled for, but unwarranted—for the reason that such action is an absorption *in limine*, of the very question of the power, the right to decide which underlies and supports the entire jurisdiction of the Courts of the United States—which would be rendered powerless, if unable to decide this preliminary point without interference from State tribunals.

Our governmental theory recognizes separate and defined spheres for the United States and the several States, with all appropriate

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incidents—judicial and others. Any improper interference or encroachment by one upon another serves to weaken all.

Under the law as stated in the cases cited, and from the return of the Marshal in this, it appears that the petitioner is in his custody under the authority of the United States. This Court can, therefore, proceed no further, and the Marshal must retain his prisoner. It is so ordered.

JOHNSON, J., did not participate in the foregoing decision.

REPORTS OF CASES
DETERMINED IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEVADA,
J U L Y T E R M , 1 8 6 9 .

**IN THE MATTER OF THE ESTATE OF MARCO MIL-
LENOVICH, DECEASED, No. 1, LEGATEES APPELLANTS.**

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ACCOUNTABILITY OF EXECUTORS AND ADMINISTRATORS. While the law closely scrutinizes the acts of executors and administrators, and requires the utmost good faith from them in all their transactions with or on behalf of the estate, it does not require infallibility of judgment nor rigorous accountability for any mishap which may occur during the administration.

LIABILITY OF EXECUTORS FOR LOSSES. If an executor, in the conscientious and judicious discharge of his duty, sustains a loss by reason of unfortunate circumstances, and not by reason of any violation of a positive requirement of law, he should not be held to strict personal account for such loss.

POSITIVE LAW MUST BE STRICTLY FOLLOWED BY EXECUTORS. When the law has clearly pointed out a certain course to be pursued by executors, that course must be strictly followed; and if they disregard it they should be held to answer for any loss which the estate may suffer thereby, notwithstanding they may have been actuated by the best of motives.

ACTS OF EXECUTORS IN GOOD FAITH WITHOUT ORDER OF COURT. If an executor should in good faith do an act without an order of Court, which the law declares shall not be done without such order, and if the act be one which the Court would have approved or ordered done, and no injury has resulted from his action, he should not be chargeable with mismanagement of the estate.

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SETTLEMENT OF ACCOUNTS OF EXECUTORS—IRREGULARITIES IN PROCEEDINGS. Irregularities in probate proceedings, which have not been prejudicial to the estate, should not influence the Court in the settlement of accounts, the main inquiry in such cases being whether the amounts charged are just and legal claims against the estate, and whether the executor has managed its affairs with good faith and ordinary prudence.

OBJECTIONS TO APPRAISERS NOT VALID OBJECTIONS TO EXECUTORS' ACCOUNTS. That the appraisers of an estate were not disinterested parties, as by statute they are required to be, is no reason why the just accounts of the executor should not be settled and allowed.

CHARGES FOR REPAIRS MADE BY EXECUTORS. If an executor be authorized to make repairs to the property of his testator's estate, and in so doing expend somewhat more than the real value of the improvements, yet if it appear that he acted in good faith, and exercised ordinary discretion and circumspection in the matter, an order of the Court below allowing the charge will not be disturbed on appeal.

LEASES BY EXECUTORS. If an executor lease property belonging to the estate represented by him, it does not follow that he should lease to those who offer to pay the highest rent; the purposes for which the property is to be used, the responsibility of the lessee, the length of time for which he may agree to lease, and many other circumstances of the kind, must be taken into consideration.

FUNERAL EXPENSES. In the settlement of executors' accounts for funeral expenses, all the circumstances of the case should be taken into consideration, and their accounts allowed, if they have acted with ordinary prudence and with a regard for decency and respectability, according to the condition in life of the deceased.

EXPENSES OF LAST SICKNESS. If the charges allowed and paid by an executor for the expenses of the last sickness of his testator, though apparently extravagant, are no more than the usual charges for like services at the time, an order approving his account of them will not be disturbed on appeal.

EXECUTORS INTERESTED IN PURCHASES FROM ESTATE. Though the statute prohibits executors from being interested in the purchase of the property of the estate, yet if such a purchase be made, the Court may affirm it, the only consideration in such case being the interest of the estate.

PURCHASE BY EXECUTOR AFTER ESTATE CEASES TO HAVE INTEREST. There is nothing in the probate law to prohibit an executor from becoming interested in property of the estate of his testator after the estate has ceased to have any interest in it.

DESPERATE CLAIMS DUE ESTATES OF DECEASED PERSONS. An executor or administrator should make all reasonable effort to collect all claims due the estate, but he should not involve it in litigation for claims which in his judgment cannot be collected; and if such claims have no value attached to them in the inventory, it will require clear proof of loss through his carelessness or want of attention to charge him with the amount of them.

MINING STOCKS OF DECEASED PERSONS. Mining stocks belonging to the estate of a deceased person, which are only an expense to it, should be disposed of,

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unless it be quite evident that it would be for the interest of the estate to hold them.

PAYMENT OF ASSESSMENTS ON MINING STOCKS BY EXECUTORS. It is within the jurisdiction of the Probate Court to order payment of assessments legally levied upon mining stocks belonging to the estate of a deceased person; and if the executor act in obedience to such order, it would be inequitable to charge him personally with payments so made, or refuse to allow them as just payments made for the estate.

LOSS OF RECORDS—NEGLECT OF CLERKS TO ENTER ORDERS. Where, on a contested settlement of the accounts of an executor, he claimed that he had paid certain assessments on mining stocks under an order of the Probate Court directing him to do so, and the order did not appear to have been entered on the minute book of the Court, and could not be found among the papers on file, but the attorney for the executor testified that it had been duly made, and that he had seen it among the papers of the Court after the contest had arisen, and that no assessments were paid until after the making of the order: *Held*, that the neglect of the clerk to enter the order, or its loss, could in no way affect the rights of the executor, nor render the order less effective as a protection to him.

SECONDARY EVIDENCE OF LOST JUDICIAL RECORDS. Where an order of the Probate Court, necessary as an authorization to justify the acts of an executor, is lost, secondary evidence of its character is allowable.

LUCICH v. MEDIN, (3 Nev. 93) to the effect that a decree of settlement of the accounts of an executor or administrator closed all further investigation in respect to all accounts allowed, except where some error or mistake appeared upon the record, approved.

EXPENSES OF CONTESTS BETWEEN EXECUTORS. The expenses incurred in a controversy between executors, one opposing the qualification of the others, are not just or proper charges against the estate.

ILLEGAL CLAIMS AGAINST ESTATES PARTLY PAID. The fact that part of an illegal claim against the estate of a deceased person has been paid and allowed in a previous account of the executor, is no reason why the balance should be allowed on a subsequent account.

EXECUTORS COMPETENT WITNESSES ON THEIR OWN BEHALF. An executor is not within the exception of the Act excluding persons as witnesses on their own behalf, where the opposite party is the representative of a deceased person, etc. (Stats. 1864-5, 77.)

COSTS ON CONTESTED SETTLEMENT OF EXECUTOR'S ACCOUNTS. Where, in a contest as to the settlement of the accounts of an executor, the Court below deducted a considerable sum, and then allowed the balance of the accounts: *Held*, that the contestants were entitled to their costs.

CONSTRUCTION OF SECTION THREE HUNDRED AND ELEVEN OF PRACTICE ACT. Section three hundred and eleven of the Practice Act does not conflict with Section four hundred and forty-one of the same, which allows costs to the contestants of an executor's accounts as the prevailing parties, when they succeed in reducing the amounts allowed on settlement.

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APPEAL from the District Court of the First Judicial District, Storey County.

Marco Millenovich, the deceased, was a saloon keeper, doing business at the "San Francisco Saloon" in Virginia City, in partnership with Marco Medin and Luco Zenovich—he being interested to the extent of one-half and they to the extent of one fourth each. On July 4th, 1863, in a difficulty which occurred at the saloon, he received a mortal wound, of which he died some ten days afterwards, leaving a will, and appointing therein Marco Medin and Vincent Millatovich his executors. Soon after his death, Medin qualified as executor and entered upon the discharge of his duties as such. Millatovich at first declined to accept the trust of coëxecutor, but afterwards did apply for letters, and they were issued to him, though his claims were opposed by Medin, on the ground of want of qualification. But notwithstanding his appointment as coëxecutor, it appears that Medin had the exclusive control and management of the estate.

Marco Medin, as executor, filed his first account on February 13th, 1864, and a second one on February 12th, 1865, which were strenuously contested by Andriana Lucich and others, the legatees under the will, and were passed upon by the Court below. From the decree thereon an appeal was taken, the decision upon which will be found reported under the title of *Lucich v. Medin*, in 3 Nev. 93.

There was subsequently, on November 23d, 1867, a final account filed, to which the legatees interposed a great number of objections, sixty-three in all, the principal of which, and all that were specially urged by counsel, are stated in the following opinion. The decree of the Court below allowed the final account with some modifications and exceptions; and from this decree there were two appeals—this one by the legatees, and another by the executor, which will be found reported as the next case.

C. E. DeLong and *P. O. Hundley*, for the Legatees Appellants.

I. The estimate of the value of improvements to the San Francisco Saloon, made by McKay and others, was made upon all the

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improvements on the premises, and is a liberal one—as McKay, in his testimony, says he was directed to make. It was made upon each item, by actual measurement and count, and by men experienced in that business, who were engaged at their trade in this place at the time the improvements were made, fully up in the prices of labor and lumber, and yet they cannot make it reach the sum charged by the executor. Why, then, should a greater sum than their estimate be allowed?

According to the best estimate that we can make on the improvements, and allowing the most liberal prices for labor and materials, and taking a part of the executor's own account rendered, we show that the estate has paid two hundred and twenty dollars and sixty-seven cents more than its due proportion of the expenses for improvements.

II. There were a number of persons who were desirous of renting the San Francisco Saloon, and procuring the good will of the business after the death of Millenovich. Applications were made to rent it. Finally, in August, 1863, Medin for himself, Mark Lovely, and Spiro Vucovich, agreed with N. Millatovich to take it for six months, at six hundred dollars per month. It could, according to the testimony, have been rented readily at six hundred dollars per month, for from six months to a year, to other parties. Medin has accounted for three months at six hundred dollars, and for the remaining three months at only four hundred dollars. He should be held for the proportional part of the difference belonging to the estate.

The executor should be charged with what the property could have been rented for; but owing to partiality or favor shown to himself and others, he failed to receive the amount that the property was reasonably worth. For if he could receive more for the property, and failed to take it, it was clearly his fault, and he is certainly chargeable with the difference between what he received and that which he could have received. An executor has no right to be generous with the property of his testator, especially so when the drift of that generosity is to his own advantage.

III. The funeral expenses were to a great extent unnecessary, extravagant, and prodigal. The aggregate amount charged by the

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executor, is the sum of one thousand three hundred and twenty-five dollars and twenty-six cents. The first item is the transportation of the body of the deceased to San Francisco, charged at three hundred and eight dollars and fifty cents. We think there should be deducted from this the sum of two hundred and eight dollars and fifty cents. Why an executor would ship a body, by private conveyance, at a cost of over three times as much as he could have shipped it by one of the express companies, is strange and unaccountable. He could have had it landed in San Francisco for the sum of one hundred dollars, and the other expenses should not have been over four hundred dollars; this would have made five hundred dollars in all, which, deducted from the one thousand three hundred and twenty-five dollars and twenty-six cents, leaves the handsome sum of eight hundred and twenty-five dollars and twenty-six cents to have erected a monument or laid a stone to mark the resting place of the deceased. The medical bill is most extravagant; for an illness of ten days, amounting to nine hundred and twenty dollars, nearly one hundred dollars per day. These bills having been paid without any order of Court, the executor has paid them at his peril. This is the first time the heirs have had an opportunity of contesting them, and we may well ask, would any Court or Jury give that sum for medical services performed for the deceased? We think not.

IV. At the death of the testator, the firm of Millenovich & Co. was doing a splendid business, of about seventeen hundred dollars per month, as the account of sales show from the first to the fifteenth day of July, A.D. 1863. The stand was well and favorably known; the stock of liquors on hand was large, of good quality, and well suited to the business; and the purchase of so complete a stock and fixtures in connection with the good will of the business was desirable, and no one appreciated this condition of things more than did Medin and Lovely; they who, in connection with Spiro Vucovich, purchased them of Medin, as executor, for the benefit of their new firm.

No executor can directly or indirectly purchase any property of the estate which he represents. (Stats. 1861, 219, Sec. 195; *Ogden v. Astor*, 4 Sandford, 349; *Devine v. Fanning*, 2 Johns.

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Ch. 255 ; *Monroe v. Allaire*, 2 Caines' Cases, 191 ; *Wormley v. Wormley*, 8 Wheat. Cond. Rep. 480 ; *Zilkin v. Carhart*, 3 Bedford, 376 ; *Case v. Able*, 1 Paige's Ch. 397, and note.)

If an executor cannot purchase from his coëxecutor without rendering himself liable for profits, he certainly must when he purchases from himself. But as the executor and his partners kept no books, it is impossible in this case to ascertain the exact profit. In such cases it has been usual to impose interest upon the executor for the amount of the purchase from the estate. Or, to take another view of the matter, it must be apparent from the evidence and authorities above cited that the stock of liquors, fixtures, and the good will of that business, was worth more than cost and freight. The same quantity and quality of articles could not be placed in that saloon for the money for which they were sold. There must of necessity be leakage, commission, breakage, and other incidents of expense, whether the goods were ordered from below, or whether the parties went after them. In either event, these expenses would fall on the purchaser ; the vendor certainly would not pay and bear this loss. And taking the wholesale price at this place, not that at San Francisco as the standard, the price of the articles sold would be greatly enhanced above what they have been returned by the executor.

V. The executor has failed to account for property that belonged to the estate, and that came into his hands ; among which is a safe, furniture, and clothes, belonging to deceased at the time of his death ; blankets, bedding, and bedstead, worth in all about two hundred and fifty dollars. These things having been shown to have been in the possession of the testator at the time of his death, and in the care and custody of the executor, he must show what he has done with them, or else they must be charged up to him.

VI. The executor returns in his inventory the sum of about three thousand seven hundred dollars for debts due the estate, and only the sum of five hundred and twenty dollars collected. What exertion has been made by the executor to collect the sums due to his testator ? The law makes it imperative upon him to use the utmost diligence in collecting the debts due to the deceased, and if he fails to use this diligence, what follows ? That he is responsible

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or accountable to the estate for all debts that remain uncollected by his fault. Do they not remain uncollected by his fault, if he uses no effort to collect them? If such is not the case, then the failure of an executor to do his duty is not negligence or a breach of trust. To escape responsibility, the executor must show that the debtors are insolvent, or at least must show a demand on the debtors and a refusal on their part to pay. (*Shultz v. Pulver*, 3 Paige's Ch. 183; 2 Williams on Ex. 1636, 1637, note *e.*)

The executor in this case has not shown a demand upon, or a refusal of a single debtor to pay the amount due the estate, or that any of said debtors were insolvent, or unable to pay the amount due the estate. Would any prudent man in the management of his own concerns have been so remiss in his duty, and so neglect his own concerns? Certainly, less diligence and attention can in no instance be indulged in to an administrator; and the course of the decisions would seem to exact a greater activity and devotion of executors, etc., in the execution of their trust.

Counsel for the executor seemed to intimate that the heirs or their agent had the right to collect these debts. This we deny, and say no authority can be produced to substantiate that position.

VII. In relation to the order said to have been made by the Probate Court "to pay all assessments due, and to become due." We maintain that the Court, being under the territorial government of inferior and limited jurisdiction, had no power or authority to make an order for the payment of assessments on mining stocks. The assessments on mining stocks was not a claim against the estate; the company could not sue the executor for the assessments on stocks belonging to the estate in case he refused to pay them; the remedy given by statute to the company was to sell the stock—they had no claim against the estate. The Court could with as much propriety have ordered the executor to borrow money, or pay the money on hand belonging to the estate to some charitable institution, as to have ordered the executor to pay all assessments on mining stocks due or to become due.

But we assert that no such order was ever made by the Probate Court. The only evidence of the existence of any such order is that of an attorney. Against his testimony stands the records of

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the Court, the testimony of witnesses familiar with the papers, that they never saw any such order among the papers, and the fact that no such order was produced or even suggested when this cause was tried before, and it was important, if such an order existed, to have produced it. Not a paper can be found on file leading to the making of such an order, and if the Court had the power it is not to be presumed that it would make it upon the mere verbal suggestion of counsel. The question, then, resolves itself into this: Had the executor a right to pay these assessments upon his own motion? We say he had not. What power does an executor possess other than those given him by statute? Is not that the measure and limit of his authority as to what he shall and shall not do? The executor cannot say he did thus and so in good faith and possibly for the benefit of the estate; his powers and duties are not measured by good intentions; if so, he might engage in any speculation that his judgment would satisfy him, and would be beneficial to the estate; and would the plea of good faith, or good intentions restore the estate to the heirs and absolve him from all accountability? Surely not.

Where the executor undertakes to go beyond the strict line of his duty as the law defines it, he acts upon his own responsibility; and while he can receive no profit from a successful use of his investment, he must bear the loss of a failure. (*Estate of Knight*, 12 Cal. 207; *Tompkins v. Weeks*, 26 Cal. 59.)

It appears in this case that the executor has taken the money, received from the sale of personal property, rents of real estate, and cash on hand at the death of deceased, and applied it (amounting in the aggregate to the sum of four thousand nine hundred and ninety-two dollars and fifty cents) to the payment of assessments on mining stocks that are valueless.

This Court, when this case was previously before it, both in the original opinion delivered and in that upon petition for a rehearing, said expressly, that the executor was guilty of an unlawful act, if he borrowed money for the estate unless authorized by will. If it were unlawful to borrow money to pay a legal charge, it certainly was unlawful to pay an illegal charge against the estate; and if he could not borrow money for either a legal or illegal purpose he

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could not legally contract to pay interest on money thus illegally obtained.

Again: The executor sells stock without any authority so to do, when there is no necessity for it, and refuses to apply for an order, and prosecute it, to sell the stock, where there is, according to his statement, an urgent necessity therefor. He exhausts the funds of the estate by paying heavy assessments, and winds up by selling the Uncle Sam stock only, at a sacrifice, and retaining the other stocks until they are worthless, making no effort, so far as disclosed by the testimony, to convert them into money for the benefit of the estate.

Such being the status of the Uncle Sam stock, the executor is chargeable with the appraised value in the inventory; and if the Court finds from the evidence that it was of any greater value than the sum at which it was appraised at any time before or after the executor disposed of it, he should be required to account for it at such value. (1 Bouvier's Law Dic., word "Devastavit," and authorities there cited.)

VIII. We claim that none of the items of this account, though contained in a former account, have been legally adjudicated and settled. This Court having required the executor to file an account making a full showing of all property and assets that have come to his hands, up to the time of filing such account, ignores all former statements, and requires the executor to have a new accounting. This shows that the former accounts were not correct; that he had not accounted for all the property and assets received by him; for if the other accounts were correct and had been properly adjudicated, upon what principle could the Court ask for a new accounting? The object was to open up the whole matter for a new and further investigation, to be determined by the weight of evidence adduced upon the trial and the *settlement of the accounts as filed*.

Again: The balance paid Aud & Beebe appears as the first item in the third and final account, and specifies particularly what it was for; to wit: "Cash paid Aud & Beebe, bal. in full for professional services in matter of application of Vincent Millatovich for letters testamentary as coëxecutor, three hundred and seventy-five dol-

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lars." This amount was not a charge against the estate, and should not have been paid by the executor. And the same is true of bill of fifteen dollars paid William H. Davenport for taking affidavits of claims against the estate. Each claimant is required to present his or her claims against the estate with proper vouchers, and in that form to be allowed or rejected by the executor; the estate is not required to pay for the affidavits to claims; that is the duty of the claimants themselves.

IX. We have examined all three of the accounts presented for settlement, as to the amount of expenditures for which there are no vouchers, and find it to be one thousand six hundred and sixty-six dollars and ninety-five cents. The statute is imperative that every executor or administrator, in rendering his accounts, "shall produce vouchers for all charges and expenses which he shall have paid." (Stats. 1861, 224, Secs. 233, 234; *Wilcox v. Smith*, 26 Barb. 341.) It only allows the oath of the administrator or executor without vouchers to items under twenty dollars, and that is limited to the sum of five hundred dollars. It is certainly against the letter and spirit of the statute to allow the executor to testify as to expenditures which he has paid, where the same is over twenty dollars. And we here assert that Medin was not a competent witness for himself on the trial of the matters contested by the heirs, and for the proof of his position refer to the following authorities: (Stats. 1864, 77, Sec. 13; *Wilcox v. Smith*, 26 Barb. 344, and authorities cited; *Roney v. Buckland*, 4 Nev. 45.)

The real contest in this matter was between Medin as executor on the one side and the estate of the deceased on the other; a settlement of his accounts with the estate, with what expenditures paid by him he should be credited, and to what amount the estate was entitled to charge him for property and moneys received by him as executor. Therefore the testimony of Medin should be stricken from the record. Upon a just and proper accounting in this matter, the executor will be found indebted to the estate in the sum of over eight thousand dollars and a fraction.

R. S. Mesick and Williams & Bixler, for Executor, Respondent.

I. In adjusting the accounts of executors Courts are governed

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by principles of equity as well as of law; and it is at all times competent for an executor in such a proceeding, like as in a pure equity proceeding, unimpeded by technical rules, to show the fairness of his dealings, the real nature of his transactions, and the amount for which he should, in fact, be held liable. (*Upton v. Badeau*, 3 Bradf. 13.) And therefore this Court will be governed by the well-established rule that things done without application to the Court which would have been ordered to be done on application, will always be sanctioned by the Court. (Hill on Trustees, 853; 1 U. S. Eq. Dig. 487, § 214.) And also by the rule that an executor is not chargeable with a loss, when he has managed as a prudent man would have managed his own affairs. (1 U. S. Eq. Dig., 495, §§ 392 and 394; *Christy v. McBride*, 1 Scammon, 75.)

Creditors may question successfully the proceedings and outlays of an executor when heirs and legatees cannot. As to creditors, the outlays must be necessary; as to heirs and legatees, they may be liberal. As to creditors, the executor must convert the property into cash; as to heirs and legatees, it is his duty simply to preserve it. (*Hancock v. Padmon*, 20 E. C. L. 382; *Verner's Estate*, 6 Watts, 253.)

As to the charge of three hundred and eight dollars and fifty cents for the transportation of the body of deceased by Mullaney from Virginia City to California, we say it cannot appear exorbitant without the evidence, and the evidence shows that the amount is not excessive. There were but two ways of moving the body: one by public conveyance, the other by private conveyance. Can any Court say that the friends of the deceased acted wrong in choosing either mode of conveyance, rather than the other? Or can the Court say even under the proofs that the mode of conveyance selected in this case was not proper, or even that it was not the only practicable one? There was no proof of any public conveyance by which the body could be moved, leaving this place oftener than once a week, and none that the body could have been moved at the proper time by such conveyance. Moreover, while it may appear that the body might as safely have been moved by the cheaper mode of conveyance as by the other, and while the wishes of friends

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whose duty it was to see the deceased decently buried, to have him transported by private rather than public conveyance, might seem a matter of mere pride or sentiment, can the Court say that such feelings and wishes are not to be respected and gratified even at a little loss to the heirs and legatees? If not, why shall an executor pay the greater expenses of transporting a dead body from the deathbed to the grave by means of a hearse rather than a dray, and why not bury him in his old clothes to save the new ones for his devisees?

We submit upon this item that prudence, economy, and decency, required the executor to pay, and not contest the item.

II. In relation to the assessments on mining stocks, it was admitted on the trial that the amount of the assessments was actually levied, and the money actually paid; that if it had not been paid, the stock would have been sold at assessment sale, and that the stock was worth more than the assessment levied upon it, at the time of the payment. It is contended that the law conferred no authority upon the executor to make these payments, and that he made them without having first obtained the authority of the Probate Court so to do. Our reply is, that the law did invest the executor with authority to make these payments under the circumstances, and not only so, but made it his duty so to do. It was the duty of the executor to preserve the estate from being sacrificed, or sold for any legal impositions either of taxes or assessments, where it was in danger. He might as well omit the payment of taxes, as assessments on personal property. (*Reily v. Sampson*, 10 Pick. 373; *Cutler v. Middlesex Factory Company*, 14 Pick. 484.)

As to the order made by the Probate Court, there is the positive evidence of the attorney of the executor in the estate, that such order was obtained by him before the payment of any of the assessments, and also the evidence of Medin that he was directed by the attorney not to pay any of the assessments until the latter had obtained such an order for their payment, and that he paid them only after he was advised by the attorney that he had obtained the order for the payment of all assessments on mining stocks belonging to the estate, due and to become due.

III. The Court upon the trial expressed its satisfaction as to the

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account for improvements and repairs. The proofs show that there was expended for these improvements and repairs a much larger proportional sum than that charged against the estate; and it is certain from the proofs that the executor, with the other joint owners, paid out for these improvements all the money which is charged in this account and more; and no one can say that it was not paid out fairly and in good faith.

Had the charges not been reasonable, it is not likely that the other owners, who were on the ground and knew all about it, would have paid their share, which they did without objection.

IV. The claims of Spiller, Devens, and McMeans, each for fifty dollars, and of Echler for sixty dollars, of Gautier for one hundred dollars, and of Bryant for five hundred dollars, for medicine and surgical attendance upon deceased, were all expenses of the last sickness, directed by the statute to be first paid, and were so paid as allowed by the Probate Judge and the executor. It would seem that the deceased, during his last illness, was as much interested in and entitled to decide the question as to what expense he should go to in procuring assistance to save his own life as are now the devisees. The executor paid the claims in good faith, and there is no evidence now that the payment of the last dollar of any one of them could have been successfully resisted.

V. As to the question of rents, the Court must see that a prudent man must look at various things in choosing a tenant and fixing the amount of rent. Can it say that the owners of this property acted unbusiness-like and imprudently, not only as to the interests of the estate, but as to their own interests in its management? One thing is certain and is admitted—that the property has been so managed, that while almost everywhere else in the city rents and values have declined to almost nothing, this property has continued to pay a liberal rent, and is still counted the best in the city. This has been done by the business habits, the care and fidelity of the owners of the property, and the executor with whom so much fault is found.

The reduction of rent complained of diminished the amount of the executor's private revenue to a considerable extent, as well as it did that of Zenovich and of the estate.

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It is plain that Medin got as good rents as anybody else who let his premises to responsible and permanent tenants, and who declined to have anything to do with mere adventurers.

VI. As to the uncollected accounts, we insist that Medin has done all that his duty required. The appraisers were unable to ascertain that these accounts were worth anything, and so put no value upon them, and yet several hundred dollars were realized out of them. The truth is, as Medin says, that the devisees and their agent took charge of them, and did recover from parties sums of money, boots, and shoes, and other things, in satisfaction thereof.

Furthermore, under the circumstances of no value being placed upon those claims in the inventory, and of the testator himself considering them of doubtful value, the executor was not at liberty under the law to hazard the money of the estate in hand, in attempting to secure these doubtful claims, and especially it was not his duty to pursue them, except at the request of the legatees or devisees, and upon an indemnity against costs, neither of which ever existed. (*Sanborn v. Goodhue, Ex'r*, 8 Foster, 48.)

VII. As to the furniture amidst which the testator died, there is no proof that it ever came into the possession of the executor, and he can be held responsible only for what came into his possession. Possibly, engrossed as he was in caring for the decent disposition of the testator's dead body, he may be excused for not having given special attention at once to the collection of these effects, which, under the circumstances, could have had but little value. There is no proof that the executor was in any default, or that these things were of any value whatever. There is no proof but hearsay that the safe belonged to the deceased.

VIII. As to the want of vouchers, we insist that the aggregate of all the items under twenty dollars for which there were no vouchers, does not exceed five hundred dollars. Medin and Keeney both testified to the loss of many vouchers.

IX. The question of admitting Medin to testify we supposed was settled on the trial, and not now open for discussion.

X. Upon the matter of striking out the cost bill, we insist that the order was correct. The matter of costs is addressed to the equitable discretion of the Court. (Stats. 1861, 235, Sec. 296 ;

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Stats. 1861, 237, Sec. 311.) Considering the whole contest upon the accounts of the executor, he prevailed. He was sustained in more than nineteen-twentieths of the items contested, whether we consider the written objections filed, and the proofs offered by the contestants together, or their proofs alone. On an appeal from a decision upon an executor's or administrator's accounts—where the allowance of costs is matter of discretion with the Appellate Court—costs are not allowed the appellant, where the appellee prevails or is sustained as to any of the material items objected to, or where he substantially prevails. In such case the rule of equity is applied. (*Griswold v. Chandler*, 6 N. H.; *Wendell v. French*, 19 N. H. 205; 1 Foster, 203; 33 N. H. 104. See also, *Eastburn v. Kirk*, 2 John. Ch. 317; *Harvey v. Chilton*, 11 Cal. 120; *Gray v. Dougherty*, 25 Cal. 266; *Scott v. Thorp*, 4 Edw. 1; *Johnson v. Taber*, 6 Seld. 319; *Richter v. Stall*, 3 Sandf. Ch. 428; *Beacham v. Eckford*, 2 Sandf. Ch. 116; *Ten Eyck v. Holmes*, 3 Sandf. Ch. 428; *Travis v. Waters*, 12 Johns. 500; *Minuse v. Cox*, 5 Johns. Ch. 441.)

The allowance of costs, then, being a matter of discretion with the Court below, this Court has no power to review that discretion. (*People, etc. v. The N. Y. Central R. R. Co.*, 29 N. Y. 418.)

DeLong, Hundley, and J. W. Whitcher, in reply.

By the Court, LEWIS, C. J. :

This matter comes before this Court upon an appeal from a decree of the District Court settling and allowing the final accounts of Marco Medin, the executor of Millenovich, deceased. Upon the hearing in the Court below between the contestants and the executor, several items were stricken from the account; but it is claimed on behalf of the heirs that there are many others settled and allowed which should have been stricken out. The objection to these items will be presently noticed, but it may be well to observe in the outset that whilst the law closely scrutinizes the acts of executors and administrators, and requires the utmost good faith from them in all their transactions with or on behalf of the estate, it

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does not require infallibility of judgment, nor rigorous accountability for every mishap which may occur during the administration. When the law requires a thing to be done, and has not plainly marked out the manner in which it shall be performed, the executor or administrator is required to exercise not only the utmost good faith but also ordinary prudence and judgment in its execution. But when it has already pointed out a certain course to be pursued, that course must be strictly followed. If the executor in the conscientious and judicious discharge of his duty, sustains a loss by reason of unfortunate circumstances, and not by reason of any violation of a positive requirement of law, he should not be held to strict personal account for such loss. "If the administrator has acted for the benefit of the estate, used proper diligence, and acted with ordinary care and circumspection in the discharge of his trust, he ought not to be held answerable for the losses which could not have been foreseen, and which ordinary precaution could not guard against." (1 Scammon, 75.) In the discharge of fiduciary duties a person is not held accountable for those mischances which ordinary prudence could not have averted. But for the consequences of rashness, imprudence, or bad faith, he is held most rigorously answerable, for although the law is indulgent to those whose acts are guided by good motives and ordinary prudence, it abhors fraud, bad faith, and reckless imprudence.

Suppose, however, the law points out a certain course to be pursued by an executor or administrator, and that course is disregarded, what is to be the consequence? One thing is certain: he should be held to answer for any loss which the estate may suffer thereby. No plea of good faith, or the exercise of prudence, will avail him as a defense in such case against the claim of the estate for indemnity or accounting. If he disregard the law he is answerable for the consequences, notwithstanding he may have been actuated by the best of motives. We do not, however, wish to be understood as holding that every violation or disregard of some requirement of law will subject the executor to the imputation of mismanaging the estate, and so subject him to a deprivation of his just commissions or compensation for the services performed by him. If, for example, he should in good faith do an act without an order

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of Court, which the law declares shall not be done without such order, and if the act were one which the Court would have approved or ordered done, and no injury has resulted from his action, he should not be chargeable with mismanagement of the estate. In every such case, however, the executor renders himself liable for any loss which may be sustained by reason of the irregularity of his proceeding. Nor should the Court always compel the executor to undo the act simply because it was done without an order previously obtained. The interest of the estate should alone be considered in such case. If it would be for its benefit to have the act of the executor set aside, that course should be pursued; but if not, it should be approved. "It is a rule in equity," says President King, in *Norris v. Fisher*, (2 Ashmead, 424) "that if an executor does without application what the Court would have approved on application, he should not be called to account and forced to undo that, merely because it was done without application." And this is a rule equally applicable in the Probate Court in every character of proceeding. It should, therefore, be borne in mind that irregularities which have not been prejudicial to the estate should in no wise influence the Court in the settlement of accounts. The main inquiries are generally, whether the accounts are just and legal claims against the estate, and whether the executor has managed its affairs with good faith and ordinary prudence. Beyond these it is generally unnecessary upon the settlement of accounts to extend investigation.

It is claimed by counsel for the heirs, however, that many of the items of the final account presented by the executor Medin are unjust and exorbitant, and that he is chargeable with gross mismanagement of the estate. And the first complaint made is, that the appraisers of the estate were not, as by statute they are required to be, disinterested parties. Whether they were or not is a question not necessary to be determined in this proceeding, for whether so or not, cannot affect the executor's right to have his just accounts settled and allowed. It was not the executor's duty, but the Court's, to select the appraisers. (Stats. 1861, 201, Sec. 108.) The failure on the part of the Court to appoint proper persons, certainly does not subject the executor to any imputation

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of wrong. Hence, all that is said with respect to the appraisers being interested parties can have but little bearing upon the real questions to be determined by this Court. That the failure of the Court to appoint disinterested persons to act as appraisers, is no reason why the executor's account should not be settled and allowed, if just and correct, is a proposition almost self-evident. And another complete answer to what is said upon this point is, that the proof is satisfactory to us that the property sold was appraised at what it was worth, and sold for its full value in the market.

The first item of expenditure in the account which is complained of is that for repairs upon certain buildings, and improvements of certain real estate, owned by the executor and the deceased in his lifetime as tenants in common. It does not seem to be claimed that the executor had not the right to make these improvements; and the only objection which is made to this item is that it is exorbitant. Whether it is so, is the only question to be decided by this Court. The sum of money expended for these purposes amounts, in the aggregate, to three thousand one hundred and forty-one dollars, and as the deceased was the owner of an undivided half only, but half of this sum (fifteen hundred and seventy dollars) is charged to the estate. It can hardly be doubted that this sum was paid by the executor for the improvements. But witnesses on behalf of the contestants, who made an estimate of the value of these improvements, testified that they should not have cost over about twenty-seven hundred dollars. The difference between this estimate and the amount expended by the executor was about four hundred and forty dollars on the entire improvements—or, two hundred and twenty dollars on the estate's proportion of the cost. From this item in the account, it is, therefore, contended, should be deducted two hundred and twenty dollars. This difference between the estimate and the amount charged in the account by the executor is certainly not very damaging to him, even if there were no testimony in support of the item; for it is well known that estimates of the costs of improvements of the character made by the executor are seldom anything more than an approximation to what is usually the real cost. Hence, we doubt

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whether, if there were no testimony whatever on the part of the executor in opposition to that presented by the contestants, this item should be remedied. But the executor did produce testimony fully showing the sum paid by him for these improvements, and charged to the estate, to be moderate and reasonable; some of the witnesses estimating their value at thirty-eight hundred dollars. The testimony being thus conflicting, and the Court below having allowed the item as a just and legal charge against the estate, we would not feel justified in disturbing the decree, even if not entirely satisfied that it was correct. But the evidence fully satisfies us that the item is just and was properly allowed.

Even if it were satisfactorily shown that the executor paid two hundred and twenty dollars more than the real value of the improvements, if he acted in good faith and exercised ordinary discretion and circumspection in the matter, we are not satisfied that he should be held to answer for such excess over the real value. (*Christy v. McBride*, 1 Scam. 74.) And we find nothing in the record to impeach either the good faith or the judgment of the executor in the matter of improvements. We conclude then that the Court below very properly refused to deduct anything from this item.

It is next claimed that the executor has not accounted for all the money received by him as rent, and that he leased the property belonging to the estate for much less rent than could have been obtained. Upon these points also we find the testimony conflicting. Upon the charge that all the rents collected are not accounted for, the evidence is very strongly in favor of the executor. It is conceded that the rent agreed to be paid by Peiser, at first, was one hundred and fifty dollars, but Lovely, Vucovich, and Medin, testify that it was reduced to one hundred dollars per month, and their testimony is corroborated by the entries made at the time in the books kept by the executor. This Court cannot treat this testimony as unworthy of belief, when it preponderates over that against it, and the Court below credited and upon it settled the account. And accepting it as true, the amount returned by the executor for rents is correct, and so it should be settled.

Whether the executor rented the several buildings to the best advantage, and in this respect discharged his duty faithfully and

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judiciously, are questions which it is always very difficult to determine, for it does not by any means follow that the property should have been leased to those who offered to pay the highest rent. That is not the only matter to be considered in securing a tenant. The purposes for which the property is to be used, the responsibility of the lessee, the length of time for which he may agree to lease, and many other circumstances of the kind, must necessarily be taken into consideration. That the executor was offered more rent than he received from those to whom he rented, is but little or no indication of mismanagement on his part. With all the circumstances to be considered in such a case, the mere proof that more rent was offered, or might have been obtained, is not sufficient to justify the conclusion of misconduct or bad faith on the part of the executor. Where so much must necessarily be left to the discretion of the executor, he should not be held to account, or his conduct impeached, except upon strong and satisfactory proof. Here, however, there is proof that the executor generally received and has accounted for as high rents as could have been obtained from responsible tenants. True, some witnesses testify that they offered more rent for the premises than was being paid, but the answer which one of them says was made him, may serve as an explanation why such offers may not have been accepted. The executor, he says, informed him that he preferred to rent the premises to the tenant then in possession, for less money than that offered, because he considered him a responsible man. The executor seems to have secured good tenants, and he may very properly have concluded that it was better for the estate to retain them than to rent to others of doubtful responsibility at higher rents. It is shown that the San Francisco Saloon was rented at six hundred dollars per month for the first three months after the appointment of the executor, but so it is also proven that it became necessary to reduce it, as the business would not warrant the payment of that amount.

If it were shown that the executor in bad faith, or injudiciously, rented the property of the estate for less than it should have brought, and what could with judicious management have been obtained, undoubtedly he should be held to account. But the evidence to establish it should be of the most satisfactory character. In this

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case the evidence is conflicting, and on the whole we think there is sufficient testimony to uphold the conclusion attained by the Court below upon this item also.

It is claimed further by the heirs that the item for funeral expenses is extravagantly high. It certainly appears exorbitant, amounting in the aggregate to over thirteen hundred dollars. But every item making up this large aggregate is given by the executor, and his proofs establish beyond doubt that he paid out the full amount charged. And the evidence on behalf of the contestants does not show the amount thus paid to be unusual or extravagant. It is not claimed that the executor should not have sent the body to California for burial, but it is claimed that the amount paid for doing it was more than should have been paid, and that the body could have been sent to its burial place by public conveyance, for about two hundred dollars less than the sum charged by the executor, as having been paid by him. But the evidence shows that the usual charges by private conveyances at that time for like services were fully as much as what is charged in this account, and this was the mode of conveyance employed by the executor. Should he have employed the cheaper mode? and if so, should he be held to account for the surplus? It seems if there were any good reason why the body of the testator should be taken to California for burial, upon the same reason it should be conveyed there in a decent and respectable manner. There was the same reason for employing a private conveyance in this case, as there is usually for employing a hearse instead of a common cart, which might be secured for much less money than the ordinary conveyance. The evidence certainly discloses no want of good faith in the executor in this matter, nor indeed anything that the most prudent and judicious man might not have done under like circumstances. With respect to funeral expenses, the Courts generally take into consideration all the circumstances of each case, and when executors have acted with ordinary prudence, they are not held personally liable.

So it may be said of the expenses of the last sickness. They appear extravagant: the proof, however, abundantly shows that all the items, including the surgeon's bill, were no more than the usual charges for like services at that time. Such testimony is sufficient

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to sustain the action of the executor in the payment of these expenses of the last sickness.

The next complaint made against the executor is, that he was interested in the purchase of the property in the San Francisco Saloon belonging to the estate. This is expressly prohibited by the statute ; and if the Court were satisfied that it was so, it might have declared the sale absolutely void—if third parties would not be affected—and ordered all the profits made from the retail sale of the liquors to be paid to the estate ; or if it were more beneficial to the estate, could have affirmed the sale. In such case, the interest of the estate is alone to govern the action of the Court. The sale should not be set aside if to do so would be in any wise prejudicial to the interests of the estate. Whether the executor was interested or not, it is perfectly evident from the testimony that the property was sold for its full market value, and the money received from it paid to the estate. Under such circumstances the Court should not arbitrarily set the sale aside, whether beneficial to the estate or not. However, that the executor was interested in the purchase is an assumption hardly warranted by the evidence. On the contrary, the persons who had the best opportunity of knowing—those to whom the sale was in fact made—testify that he was not ; that he did not become interested in the saloon until after the appraisement and sale to Lovely and Vucovich. It is true, an executor or administrator subjects himself to suspicion when he acquires an interest in property belonging to the estate, even after sale to third parties—and hence, it should always be avoided ; but there is nothing in the law to prohibit him from becoming interested after the estate has ceased to have an interest. The testimony in this case shows that Medin did not purchase from the estate and was not interested in that sale, but he acquired an interest after a sale for its full value to Lovely and Vucovich. An interest so acquired, although it may create the suspicion that he was interested in the first sale, is nevertheless not sufficient to authorize setting it aside. The Court ruled correctly, then, in refusing to disturb the sale.

Again : The contestants complain that proper diligence was not used to collect the debts due the estate. It is not, however, shown

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that any solvent debt has been lost by the default of the executor. The attempt to do so proved abortive. As no value was placed upon these debts in the inventory, they must be considered desperate; and in such case the burden of proof is upon the contestants, when it is sought to make the executor liable for loss resulting from such cause.

In the case of *Rowan v. Kirkpatrick et als.*, (14 Ill. 12) where an attempt was made to hold the executor liable for uncollected debts, the Court used this language, which is pertinent here: "*Prima facie* his (the executor's) estate should not be held liable for any of the uncollected debts which were inventoried as desperate. Upon *clear* proof that any debt was lost through his carelessness or want of attention, his estate should undoubtedly be held responsible; but an administrator, who has acted in good faith in the collection of the debts due his intestate, and intended fully and fairly to discharge his duty in that respect, ought not—if his intentions have been decided by a reasonable judgment in the matter—be charged with the loss of debts which he has failed to collect. While care must be taken to guard against an abuse of their trusts, by administrators, Courts ought not to hold them personally liable upon slight grounds, lest suitable persons be deterred from undertaking these offices." An executor or administrator should certainly make all reasonable effort to collect the debts due the estate; but he should not involve it in litigation for claims which, in his judgment, could not be collected. If the debts be inventoried as desperate, he should not be held for any uncollected, unless it be shown that they were lost by his want of proper management or effort.

We do not wish to be understood as holding that no effort should be made to collect even desperate debts; on the contrary, the executor should make all reasonable exertion to collect them. If, however, no collections are made, the burden of proving that they might, by proper effort, have been collected, lies upon those who seek to make the executor or administrator liable for loss. In short, *prima facie*, all debts which are inventoried as desperate, or to which no value is attached, are to be treated as uncollectable—hence, it is incumbent upon those claiming that they were solvent

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and collectable to establish that fact. In this case, as before stated, the contestants have not shown that any collectable debt has been lost by the fault of the executor. He should not, therefore, be held answerable.

So, too, it is claimed the executor had no authority to pay the assessment levied upon mining stocks belonging to the estate. It is admitted that the assessments were actually levied; that they were paid by the executor; that if not paid, the stocks would have been sold; and that the stock was worth more than the assessments levied at the time of payment.

Under the statute of this State the executor and administrator have the possession and control of both the real and personal property belonging to the estate, which it is incumbent upon them to manage under the direction of the Probate Court prudently and economically, always of course following the requirements or directions of the statute where any exist. The statute makes it his duty to care for and manage the estate. With the possession and full control of all the property of the estate in the executor or administrator, who is required to manage it with prudence and good faith, can it be said with any show of reason that he has not the right, and would not be justified by an order of the Probate Court to pay any legal claim against the property, which if not paid would result in its loss to the estate? Is it not the executor's or administrator's duty to pay all legal taxes levied upon the property of the estate, or will he be justified in permitting it to be sold to satisfy them? Why is it not equally his duty to pay such assessments upon mining stocks as may be legally levied, and the payment of which is necessary to preserve it from sale? To allow valuable stock to be sold for assessments less than its value, would certainly subject an executor to the charge of misconduct. It is perhaps not his duty, nor do we think he would be justified in holding stock which is subject to assessments beyond such time as will be necessary to obtain an order of Court respecting it. Property of this kind, which is only an expense to the estate, should certainly be disposed of in some way, unless it be quite evident that it would be for the interest of the estate to hold it. But in such case an executor would certainly subject himself to liability for all loss unless he acted under

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the direction of the Court ; for his primary duty, it would seem, is to obtain an order to sell such property. But an order of Court, ordering him to pay all assessments, is a sufficient protection to him. It is, undoubtedly, within the jurisdiction of the Probate Court to order such payments ; and if the executor act in obedience to such order, it would surely be inequitable to charge him personally with payments so made, or refuse to allow them as just payments made for the estate. The Probate Court in this case ordered the executor to pay all assessments then due, or which might thereafter become payable on the stock. In accordance with this order a large sum of money was paid, and now it is claimed that his claim for the money so paid should not be allowed. Had he not acted under an order of Court we should be induced to think it should not be allowed, for payment of the amount of assessments here charged would, if not paid by order of Court, be unwarranted under the circumstances. Why the Probate Court should have made an order so general and sweeping is entirely inexplicable, unless that tribunal was imbued with the notion so prevalent among the people in general at that period, that mining stocks, no matter how unprofitable at the time, or how heavy the assessments upon them, were nevertheless not to be disposed of for any reasonable sum, because of the priceless value which it was supposed they were to possess in the immediate future. No matter how indiscreet, the order was made, the executor acted in accordance with it, and we see no just grounds upon which his estate can be chargeable with the money so paid.

But it is argued by counsel that no such order was ever made. The attorney who obtained it, however, testifies positively that it was, and that no assessments were paid until after it was made ; that he saw the order among the papers of the Court after this difficulty between the contestants and the executor had occurred. It does not appear to have been entered at length on the minute-book of the Court, as required by section two hundred and eighty of the Probate Act ; but such neglect on the part of the Clerk of the Court can in no wise affect the rights of the executor, nor render the order less effective as a protection to him. It was no fault of his that the order was not properly entered, and if it were in fact

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made, (and upon the testimony we have no alternative but to believe that it was) that is sufficient for his protection. The order itself, it is true, was the best evidence, but not being able to find it among the records of the Courts, secondary evidence of its character should certainly be allowed in a case of this kind. The Court below received the evidence of the attorney who obtained the order upon that matter, and properly so.

As to the items embraced in the second account, it is only necessary to say that they have once been settled and allowed by the Court; and section three hundred and thirty-nine of the Probate Act makes such settlement final and conclusive unless reversed on appeal. The language of this section received the consideration of this Court in the case of *Lucich v. Medin*, (3 Nev. 93) where it was held that a decree of settlement closed all further investigation in the respect to all accounts allowed, except where some error or mistake appeared upon the record. There is nothing upon the record showing that any item of the second account was allowed by mistake, or that the Court committed any error in so allowing it. The decree settling it, it must therefore be accepted as conclusive of the legality and justice of every item in the account.

There is an item in the third account which we think was improperly allowed: that is, the claim of three hundred and seventy-five dollars allowed Aud & Beebe, for attorneys' fees. This charge was for service rendered in a controversy between the executors themselves—Medin opposing the qualification of Millatovich, his coëxecutor, who was afterwards admitted. The services rendered were for Millatovich.

In contests of this kind between executors, it is certainly not just or proper that the estate should be charged with the expense. It is true, a portion of this fee was previously paid and allowed by the Court, and this perhaps led Medin to believe that the balance would also be allowed; but, properly, he should have been held liable for the entire fee. That a portion of it has been paid, by the order of the Court, by the estate, is no reason why it should be charged with the balance. This item was, we think, improperly allowed, and must be stricken out.

We are unable to see the force of the objection that Medin is

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not a competent witness on his own behalf. He certainly does not come within the exceptions mentioned in section thirteen, (Stats. 1864-5, 77) as that section is interpreted by this Court in the case of *Roney v. Buckland*, (*ante*); nor does the case of *Wilcox v. Smith* (26 Barb. 37) bear out the position of counsel for contestants, for it will be seen by that case the code of procedure, which in New York, as in this State, allows parties, although interested, to testify, has no application to proceedings in the Surrogate Court; whilst in this State it is expressly declared that the mode of proceeding prescribed by the Practice Act shall be applicable to probate proceedings. (Probate Act, Sec. 295.) His own testimony is not of course sufficient to support any item of expenditure exceeding twenty dollars without a voucher, (Probate Act, Sec. 234) unless it be shown that vouchers were in fact taken, but were lost or destroyed, and no new vouchers could be obtained.

As to the matter of costs in the Court below, the contestants are certainly entitled to them. It appears that upon this contest the Court below deducted the sum of sixteen hundred and seventy dollars, the most, if not all, of which was properly deducted. To this extent the contestants prevailed in the lower Court, and are entitled to their costs. Section four hundred and forty-one of the Practice Act declares: "There shall be allowed to the prevailing party in any action in the Supreme Court, District Court, and Probate Court, his costs and necessary disbursements in the action or special proceeding, in the nature of an action." The section three hundred and eleven of the Practice Act in no wise conflicts with this section, for it only provides for the allowance of costs in cases *not otherwise provided for by law*.

The order of the Court below striking out the cost bill filed by the contestants was therefore erroneous and must be reversed. The item of three hundred and seventy-five dollars allowed Aud & Beebe must be stricken out, and the decree in this respect is ordered to be so modified; otherwise, it is affirmed; respondents to pay the costs of this appeal.

WHITMAN, J., did not participate in the foregoing decision.

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IN THE MATTER OF THE ESTATE OF MARCO MILLE-
NOVICH, DECEASED.—No. 2—EXECUTOR, APPELLANT.

INTEREST ON MONEY BORROWED BY EXECUTORS NOT ALLOWED. An executor or administrator has no authority to borrow money for the use of the estate represented by him, nor will interest on money borrowed for the estate be allowed.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an appeal by the executor from the same decree which was the basis of the appeal by the legatees reported in the foregoing case.

R. S. Mesick and Williams & Bixler, for Executor, Appellant.

P. O. Hundley, for Legatees, Respondents.

Executors are not allowed to borrow money or allowed interest. (*Lucich v. Medin*, 3 Nev. 109; *Storer v. Storer*, 9 Mass. 37.)

The point of interest has been passed on by this Court, and is the law of this case. (*Lucich v. Medin*, 3 Nev. 109; *Phelan v. San Francisco*, 20 Cal. 39.)

By the Court, LEWIS, C. J.:

Marco Medin, the executor of the estate of Millenovich, appeals to this Court from that part of the decree disallowing certain items charged in his final account as interest paid on money borrowed for the estate.

In our opinion, the decree in this particular is correct. The statute no where confers upon an executor or administrator the authority to borrow money for the use of the estate represented by him. No order of Court directing him to do so was produced in this case, nor was there any showing or offer to show that the necessities of the estate required anything of the kind. Were either shown, there might be some show of right upon the side of the appellant; but in the absence of both we must conclude that the borrowing of the money was without authority, and that the estate

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should not be charged with interest money so paid by him. We do not wish to be understood as holding that even an order of Court directing an executor to borrow money for the use of the estate, without a showing that its necessities required it, will justify the payment of interest, or entitle the executor to have it allowed out of the estate if paid by him. It is sufficient here to say that, as neither was shown in this case, the appellant has failed to show error in the particular complained of. The decree, so far as it disallows the item of interest, is therefore affirmed.

WHITMAN, J., did not participate in the foregoing decision.

**WILLIAM WEBSTER, RESPONDENT, v. HENRY L. FISH,
APPELLANT.**

INJUNCTION TOO LATE TO RESTRAIN ACT ALREADY DONE. Warrants already issued by a County Auditor are beyond the reach of an injunction suit brought to restrain him from issuing such warrants.

COUNTY WARRANTS ISSUED NOT AFFECTED BY SUBSEQUENT INJUNCTION. An injunction, to restrain the issuance of warrants by a County Auditor, cannot affect parties interested in warrants already issued by him.

DISTINCTNESS OF COUNTY FUNDS—ISSUANCE OF COUNTY WARRANTS. The mere fact that a creditor, having a right of payment out of the "General Fund" of a county, may have a right to enjoin the County Auditor from issuing warrants in favor of others against such fund, does not give him a right to restrain the Auditor from issuing warrants against other funds.

CONSTRUCTION AND REPAIR OF ROADS AND BRIDGES—POWERS OF COUNTY COMMISSIONERS AND AUDITOR. Under the Act of 1865, relating to the apportionment of county revenues, (Stats. 1864-5, 376) it is within the power of County Commissioners to authorize the payment of indebtedness incurred in the construction or repair of public roads and bridges, out of the "General Fund," and that of the County Auditor to draw warrants thereon for such indebtedness.

CONSTRUCTION OF STATUTES—"GENERAL FUND" OF COUNTY. Under the Act of 1865, relating to the apportionment of county revenues, (Stats. 1864-5, 376) the cost of the construction and repair of public roads and bridges may properly be considered such county expenditures as may be met by moneys in the "General Fund" of the Court.

APPEAL from the District Court of the Third Judicial District, Washoe County.

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Webster, the plaintiff, was the District Attorney of Washoe County, and as such held scrip and evidences of indebtedness against the "General Fund" of the county. As such holder, he commenced this suit against the defendant, Fish, who was County Auditor, to enjoin him from drawing the warrants referred to in the opinion. The Court below granted a perpetual injunction, "the auditing of the claims on the several funds hereinafter named, [naming the several claims allowed to the amount of over six thousand dollars] being, in the judgment of the District Court, illegal and without authority of law."

Robert M. Clarke, for Appellant.

The County Commissioners have power in their respective counties to lay out, control, and manage public roads and bridges, and to make such orders as may be necessary to carry their control and management into effect. (Stats. 1864-5, 259, Sec. 8, Par. 4; Stats. 1866, 252, Sec. 2.) They also have power to settle and allow all accounts legally chargeable against the county. (Stats. 1864-5, 258, Sec. 8, Par. 2.)

The power to pay for material furnished and work done in constructing bridges or repairing roads is a necessary incident to the power to manage and control.

The several county funds, as created by law, are: 1st, General; 2d, Contingent; 3d, Indigent Sick. All the moneys coming into the county treasury must be apportioned to these funds. (Stats. 1864-5, 376.) Clearly, under general law, the claims in suit, if payable at all, must be paid out of either the General or Contingent funds.

The plaintiff's claims are against the General Fund, and having no demand against the Contingent Fund, are in no sense damaged or prejudiced by warrants drawn on that fund.

The provision (Stats. 1866, 252, Sec. 3) which provides that the Commissioners may levy a tax not exceeding "one-fourth of one per cent.," etc., is directory. If the Commissioners do not see proper to levy the tax, or if, when levied, prove it insufficient, the Commissioners may draw upon or use other moneys to pay the necessary expenses of constructing or repairing roads and bridges. The Act

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(Stats. 1867, 68) providing for the creation of road districts, election of Supervisors, and levy and collection of four dollars poll tax for road purposes, does not affect this case.

J. H. Flack, for Respondent.

[No brief on file.]

By the Court, JOHNSON, J.:

The Board of Commissioners of Washoe County, from February 8d, to July 9th, 1868, allowed a number of claims as charges against said county, for work performed and materials furnished in the repair of public roads and bridges situated therein; and authorized and directed warrants therefor to be drawn against certain funds, known respectively as the "General Fund," "Contingent Fund," and "Road District Fund, No. 9," the fund out of which each claim was to be paid, being specified. In due course these claims were audited by the County Auditor, in accordance with the directions of the Board, and the warrants in part drawn and paid, when, on the thirtieth of July, 1868, the plaintiff in this case brought an action in the proper Court to enjoin the issuance of warrants on all of these claims. The only grounds stated in the complaint on which such action can be considered are, that certain moneys were, by the order of such Board, placed in these funds; that warrants drawn thereon were payable in the order they were allowed; that the plaintiff was a creditor of such county, evidenced by certain other warrants drawn against the "General Fund," but of later date than the first named claims, whereby the payment of his demands against the county would be postponed to a much later time, to his great injury and damage. A demurrer to the complaint was interposed on behalf of defendant, for the reason that the facts stated did not constitute a sufficient cause of action. This demurrer was overruled, and defendant declining to make answer, final judgment was rendered against him, with an order enjoining and restraining the issuance of warrants on any of these claims.

Defendant appeals to this Court from the judgment and order. It is manifest that the pleading does not under any just view of the case support in full the judgment and order. The warrants which

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had been issued before suit was commenced and notice thereof, were beyond the reach of such process, but inasmuch as this part of the decree and order was perfectly harmless and could in no wise affect the parties in interest, we perhaps would not consider it necessary to interfere, provided this was the only error apparent from the record.

As before stated, a portion of the claims allowed by the Board, for which warrants had been and were proposed to be issued by the Auditor, were against funds other than the "General Fund," whilst the warrants held by plaintiff called for payment out of the "General Fund" only. It is in no manner shown that the issuance of warrants against the two other funds would in the least degree impair the value of his securities, or postpone the time of their payment. Plaintiff's only interest in the matter, at best, is in protecting the "General Fund," and to extend the order beyond this was error.

In passing upon the next and only remaining question, we must likewise be restricted to the matters embraced in the record of the case, whether upon the facts therein relied on, warrants might lawfully be drawn on the "General Fund" for county indebtedness incurred in the construction or repair of public roads and bridges. Aided by the brief of appellant's counsel, there being no appearance in this Court on behalf of respondent, we have looked into the several statutes of this State regulating the duties and powers of Boards of County Commissioners in connection with this subject, and conclude that it was within the power of the Board to authorize the payment, and for the County Auditor to draw warrants on the "General Fund" for such indebtedness. The law (Stats. 1864-5, 376, Sec. 1) requires "Boards of County Commissioners in the several counties of this State, to apportion all the moneys coming into the county treasury, or so much thereof as is not by law set aside into special funds, as follows: two-thirds shall go into the General County Fund." * * *

The purposes of this fund, or the objects of county expenditure to which it shall be applied, are nowhere defined by our law; and being thus undefined, except so far as the usual signification and meaning of the words import, we are of the opinion that public

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roads and bridges may properly be considered such county expenditures as may be met by moneys in the "General Fund," and, consequently, warrants might be lawfully drawn thereon for such purposes. Whether such appropriation of moneys in the "General Fund" would be authorized, in case it was shown that taxes had been collected for road purposes under either the general road law or the Act authorizing the levy and collection of a special tax, we do not pass on now, as the matters stated in the pleading in no way raise any such issue.

Judgment and order reversed, with directions to the Court below to dismiss the case.

THE STATE OF NEVADA EX REL. WILLIAM HOOTEN
et als. v. D. C. McKINNEY.

CONSTITUTIONAL CONSTRUCTION. Section two of the Act of 1869, providing for the transfer of certain records and suits from the county seat of Lander County to the county seat of White Pine County, (Stats. 1869, 137) though local and special in its nature, does not provide for changing the venue in any case, and is therefore not in conflict with section twenty of article four of the Constitution.

CHANGE OF VENUE, WHAT. To change the venue in a case is to direct the trial to be had in a different county from that where the venue is laid; but if a new county be created out of a portion of an old one, an Act directing suits relating to property in the new one to be tried in the new county is not an Act changing the venue of such suits.

TRANSFER OF RECORDS FROM LANDER TO WHITE PINE COUNTY. Where the County of White Pine was created out of a portion of the County of Lander, and certain records and suits relating to property in the new county were directed by legislative act to be transferred from the county seat of Lander County to the county seat of White Pine County, and to be tried in the District Court of the Eighth instead of the Sixth Judicial District: *Held*, that such Act was not an Act changing venue within the meaning of the constitutional prohibition of a legislative change of venue.

STATUTORY CONSTRUCTION—TRANSFER OF JUDICIAL RECORDS. The Act of 1869, providing for the transfer of certain records and suits from Lander to White Pine County, (Stats. 1869, 137) is not an Act regulating the practice of Courts of Justice.

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MANDAMUS. Under the Act of 1869, providing for the transfer of certain records and suits from Lander to White Pine County, (Stats. 1869, 137): *Held*, that it was the duty of the County Clerk of Lander County to transfer the records and suits therein directed to be transferred, and that he could be compelled to do so by mandamus.

APPLICATION to the Supreme Court for mandamus.

The relators, William Hooten, F. W. Clute, and J. R. Withington, were defendants in an ejectment suit brought against them by M. Monahan and John P. Kelley, for certain land in the town of Hamilton, the county seat of the new County of White Pine. It was the records and papers in that suit which they desired to have transferred from Austin, the county seat of Lander County.

From the answer of the respondent, it appears that the relators had made a motion in the Sixth District Court for a transfer of the case, on the same grounds as those presented in this application; and that on such motion it had been held that the Act of 1869, providing for such transfer, was unconstitutional and void, and the transfer refused. The case had then been tried at Austin as to the defendant Clute, and judgment rendered against him, and a motion by him for a new trial was pending in the Sixth District Court at the time of this application to the Supreme Court.

Clarke & Wells, for Relators.

The Act of March 5th, 1869, authorizing the transfer of certain suits, etc., is not a "special," or "local" law, "changing the venue in civil and criminal cases":

1st. Because it is an Act affecting the whole public, and not particular individuals.

2d. Because it is an enforcement of the general policy of the law, and makes no exceptions to that general policy.

3d. Because it was a necessity resulting from the creation and organization of White Pine County, correcting all incongruity produced in the operation of the general laws of the State by the creation of said county, the power to correct which flowed from the power to create.

4th. Because, an Act directing the transfer of judicial records

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from an old county where the suit is pending, to a new county where the subject matter is situated is, in no sense, a "change of venue," as inhibited by the Constitution.

The term "local," has really no place in this discussion. It is scarcely possible to conceive a local law "providing for changing the venue in civil and criminal cases." "Special" laws changing the venue necessarily affect individuals—not localities. When we give full scope and efficiency to the term "special," we find the term "local" left wholly without pertinent application to the clause in hand. It has no more direct application to the clause, "providing for the change of venue in civil and criminal cases," than to the clause "granting divorces," or "changing the names of persons," nor than the term "special" has to the clause "regulating the practice in Courts of Justice."

It is, then, with the term "special" we have to deal. What are we to understand by a special law providing for changing the venue in civil and criminal cases? Manifestly this: An Act of the Legislature directing the transfer of a particular cause, from the county where the subject matter of the action lies or the parties to the action reside; this was the evil sought to be prevented. The Act of the Legislature of California to change the venue in Horace Smith's case, is illustrative of the point; and we have reason to believe that very Act led to the insertion of the clause, in our fundamental law, under consideration. Clearly, the Act is not *special*, in this or any just sense, nor is it fraught with any of the evils sought to be obviated. On the contrary, it is in accord with the spirit of the law and general policy of the State, and relieves from an exceptional hardship, wholly and purely incident to the creation of White Pine County, by putting causes for trial into the county where the parties reside and the subject matter is situated, the county where the general law requires the trial to take place; and does not apply to any particular case or individual, but embraces all cases and persons falling within its scope.

The venue of an action is the locality, neighborhood, or county, where the subject matter of the suit is situated, or, in personal actions, wherein the parties, or some of them, reside. While it is in some sense the place of trial, it is by no means always compre-

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hended by the place where a cause is tried. It is a law term of fixed and well-understood significance. (3 Bl. Com. 294; Gould's Pleading, Ch. 3, Sec. 102; Steph. Plead. 398; 3 Bouv. Inst. 210.)

This is the sense in which the term is used in our Constitution. The intention was to prevent the Legislature from removing a cause from the county where the fact transpired, or the subject matter was situated, to secure, among other things, that time-honored right of trial by jury of the vicinage.

Garber & Thornton, for Respondent.

The Act of March 5th, 1869, is in direct conflict with the provisions of the Constitution that the Legislature shall not pass local laws regulating the practice of Courts of Justice and providing for changing the venue in civil and criminal cases. It is "local" and "special," inasmuch as it refers to only two counties, operating in them alone, and not over the entire State, and as it refers to those cases only pending in the District Court of the Sixth Judicial District, of a certain class, and not to other cases of the same class pending in the other District Courts of the State. (*State ex rel. Clarke v. Irwin*, April Term, 1869.)

Again, the applicants for this mandamus did not avail themselves of the privilege conferred by the general law to have the case transferred from Lander to White Pine County, having failed to demand the transfer before answering. (Stats. 1869, 199, Sec. 21.)

In the action of *Monahan and Kelley v. Clute, Withington, and Hooten*, the three defendants answered separately, and demanded separate trials; and a trial in the Lander District Court has been had between the plaintiffs and defendant Clute, and judgment rendered for plaintiffs. Clute then cannot join in this application with the other defendants, his case having been tried, and it being required in application for change of venue that all defendants unite.

By the Court, LEWIS, C. J.:

The relators ask the issuance of a mandamus by this Court to compel the defendant, who is the County Clerk of the County of

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Lander, to transfer certain records to the Clerk of the new County of White Pine. The application is founded solely upon section two of an Act entitled "An Act authorizing the Transfer of certain Records and Suits from the County Seat of Lander County to the County Seat of White Pine County," which reads in this wise: "All suits now pending in the District Court of the Sixth Judicial District, which in any way appertain to property—real, personal, or mixed—belonging or being in White Pine County, and all actions for the recovery of any debt, claim, or demand whatsoever, between citizens of White Pine County, shall, (if then undetermined) at least ten days before the first day of the first term of the District Court of the Eighth Judicial District, be by the County Clerk of Lander County transferred, duly and legally certified, to the County Clerk of White Pine County; and all suits so transferred shall be, by the County Clerk of said White Pine County, filed in his office, and entered in the calendar of the aforesaid first term of said District Court: *provided*, where both the plaintiff and defendant to any suit shall file a written statement with the County Clerk of Lander County, requesting that the suit to which they are parties may be determined in said Sixth Judicial District—then and not otherwise, said suit or suits shall not be transferred as herein provided."

Here the duty is unmistakably imposed upon the defendant to transfer the records in question in this proceeding; but it is interposed in his behalf, that the section above quoted is in conflict with a portion of section twenty, article four, of the fundamental law of the State, which declares that the Legislature shall not pass "local or special laws" * * * "providing for changing the venue in civil or criminal cases." This Act, it is argued, is local and special, and provides for changing the venue in the cases directed to be transferred to White Pine County—hence, it conflicts with constitutional inhibition here referred to, and is void.

Whilst we agree with counsel for the defendant that the law in question is local and special, it does not in our judgment change nor provide for changing the venue in any case. To ascertain whether our conclusion upon this point be correct or not, it may be necessary to inquire, what is here meant by the venue of a case? Burrill defines the word "venue" as "a neighborhood; the neigh-

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borhood, place, or county, in which an injury is declared to have been done, or fact declared to have happened." And again: "The county in which an action is intended to be tried, and from the body of which the jurors who are to try it are summoned. To change the venue, is to direct the trial to be had in a different county from that where the venue is laid." The venue," says Bouvier, "is the county from which the jury are to come who are to try the issue." This is doubtless a correct definition of the word as used in the Constitution—that is, it is the county wherein the action is brought and the jury are to be obtained. The action in which the relators are interested and which it is claimed should, under the Act in question, be transferred to the County of White Pine, was instituted for the purpose of recovering possession of certain real estate located in what was known as Lander County at the time the action was commenced, but within the limits of what is now White Pine County, which was erected out of territory formerly within the boundaries of Lander. The old County of Lander, therefore, at the time the Act in question was passed, was the proper venue of the action. To transfer it to any county beyond the territorial limits of that county, would undoubtedly be held a change of venue. But can the transfer of a case, from one locality of a county to another locality within the same county, be considered a change of venue? Certainly not—because the trial is still to be had within the same venue—that is, within the same county.

Let it be supposed that a District Court be held at two or more places in the same county, it would hardly be claimed that the venue of an action, which might be transferred from one of such places to another, would be changed. No geographical division of the State less than the counties is recognized in ascertaining or determining the venue or place of trial of an action instituted in the District Courts—hence, there can be no change of the venue, unless the case be transferred beyond the territorial limits of the county where it may be for trial at the time of its removal. If instead of transferring it from one locality in the same county to another, the county be divided in two or more counties, can it be any more a change of venue to transfer a case by the same Act

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making such division from one of such counties to another, than to transfer it from one locality to another in the same county? There is substantially no difference between the two cases—for in either the action would still be triable within the same territorial limits.

At the time the Act under consideration was passed, the law creating the County of White Pine had not taken effect—hence, the proper venue of the action was the old County of Lander, which included all of the territory embraced in the new County of White Pine. Had the Legislature simply ordered the transfer of the case from Austin, the county seat of Lander County, as it stood before the division, to Hamilton, (which is now the county seat of White Pine County) without dividing the county, it will hardly be claimed that the venue would be thereby changed. But there has been no time when the County of Lander, with its present limits, was any more the proper venue of the action than the County of White Pine—because, legally although not practically, the action was transferred to that portion of the County of Lander which is now known as White Pine before the division of the county—the Act ordering the transfer taking effect on March 2d, while the Act creating the County of White Pine did not take effect until a month later. Suppose the Legislature, instead of dividing the County of Lander, had established an additional District Court within its limits, giving jurisdiction over a certain portion of the county only, (assuming for the present that the Legislature had the right to do so) and by the same Act transferred cases from the old to the new Court, it cannot, we think, be successfully maintained, that such transfer would constitute a change of venue of the cases so transferred—for, although changed from one Court to another, still they would remain within the same venue or county. Yet, the only distinction between that case and this, is that here the territory over which the new Court has jurisdiction, is created into a new county with a new name. However, the jury who are to try the issues must of necessity come from within the territorial limits of the county where the venue is originally laid—therefore, it seems to us, it remains within the same venue. If any territory, not included in the limits of the old county, were embraced within the new, or if at the time of the division or creation of the new county there

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were no provision for transferring cases from the old county to the new, a very different question would be presented. Here, there is simply a division of a county, and prior to or at the time of such division, suits are transferred from one portion of such county to another, organized as a new county.

Such being our view, we conclude that the Act in question does not affect such change of the venue in the case mentioned in it as to make it obnoxious to the constitutional clause referred to. Nor can it be considered an Act "Regulating the Practice of Courts of Justice." It in no wise purports to regulate the practice of Courts or of any Court, but simply directs the transfer of records of certain suits from one Court to another. The Act being constitutional, the mandamus must issue as prayed for.

**DANIEL G. CORBETT, RESPONDENT, v. MOSES JOB *et al.*,
APPELLANTS.**

ASSIGNMENT OF ERRORS IN STATEMENT ON APPEAL. A statement on appeal must contain a specific statement of the particular errors or grounds relied on.

MATTER PROPER IN STATEMENT ON APPEAL. A statement on appeal may contain all matter necessary for explanation of its grounds of error, (which must be specifically stated) such as the verdict of a jury, findings of fact and conclusions of law when not made part of the judgment, minutes of the Court, etc.

HOOPES v. MEYER (1 Nev. 433) AND **GILLIG, MOTT & Co. v. THE LAKE BIGLER ROAD COMPANY**, (2 Nev. 214) on the point that a statement is not required to specifically state the errors relied on, disapproved.

MERE NARRATIVE OF TRIAL NOT A STATEMENT. A paper containing a mere recital of the progress of a trial and detail of matters occurring thereat, with exceptions to the rulings of the Court taken therein, but not presenting such exceptions in the form of a bill, nor in any manner except as simply noted in the course of the narrative, is in no sense a statement, and must be disregarded.

FINDINGS NOT "WRITTEN OPINION." The Practice Act, section three hundred and forty, when it speaks of "any written opinion placed on file in rendering judgment," does not refer to findings.

PRACTICE ACT, SECTIONS ONE HUNDRED AND EIGHTY-TWO AND THREE HUNDRED AND FORTY—"WRITTEN DECISION" AND "WRITTEN OPINION." The "written decision" referred to in section one hundred and eighty-two of the Practice Act, is something which must precede the judgment, and upon which it is entered, and is different from the "written opinion" referred to in section three hundred and forty.

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8	190
9	48
9	152
10	288
13	86
16	92
17	268
30*	889
20	48
14*	587
5	201
21	451
33*	660
5	201
24	461
125	68
25	95
5	201
28	150

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts necessary to an understanding of the opinion are sufficiently stated therein.

Clarke & Wells and *Williams & Bizler*, for Respondent.

I. The statement on appeal does not "specifically point out the particular errors upon which the appellant intends to rely," and for this reason must be disregarded. (Practice Act, Sec. 332; *Barrett v. Tewksbury*, 15 Cal. 334; *Hutton v. Reed*, 25 Cal. 478; *Burnett v. Pacheco*, 27 Cal. 408; *Barstow v. Newman*, 34 Cal. 90.)

II. The objection that the Court below erred in setting aside and disregarding the verdict of the jury is not contained in the record, and cannot be taken in this Court for the first time. The point does not arise upon the judgment roll. The verdict, having been set aside by the Court, is no longer a vital paper or proceeding in the case, and can only become so after the order setting it aside shall have been reversed. How can this order be reversed without an exception, without a statement, without a bill of exceptions upon the judgment roll alone? If the defendant was dissatisfied with the action of the Court below in setting aside the verdict of the jury, he should have made his objection and taken his exception; made the whole a part of the record by statement or bill of exceptions; and should have specifically pointed out this action of the Court as error upon which he would rely on appeal. (*Harper v. Minor*, 27 Cal. 109; *Stoddard v. Treadwell*, 29 Cal. 281.)

III. If the statement contained in the record is to be looked to, it is apparent that the Court (having the power) should have disregarded the special findings of the jury, because there is not a particle of evidence tending to support them. If, on the other hand, the statement is not to be considered, then there is nothing to warrant this Court in saying that the Court below erred. Not knowing what the proofs were, or what were the grounds upon which the action was based, it is impossible for this Court to say that the "proofs" in the one case or "grounds" in the other were insufficient. All presumptions are in favor of the Court below.

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Hillyer, Wood & Deal, for Appellants.

I. The statement is sufficient. The object was to place before the Court the verdict of the jury. This it has done, and in doing so the error relied upon was stated as specifically as it is possible to state it. The statute will bear two constructions. It may be read as requiring that the grounds and errors shall be specifically stated, or that there shall be a separate and specific statement, of what grounds and errors will be insisted upon.

The former construction was given for ten years by the California Court to a similar statute, which required the grounds of appeal to be set forth.

The object of the requirement to "specifically" state, was to avoid incumbering the transcript with more evidence than might be necessary. We insist that the provision has no application to a case where record matter solely is relied upon, as in this case. In California this error could have been presented without any assignment or statement of grounds. It would have been sufficient then to have filed a notice of appeal and bond, and then the verdict would have gone up as part of the judgment roll, and the error would have been assigned on the argument. If our statute is different concerning what must go in a statement, there should be a corresponding difference in the construction of the section in question. The rule should be modified with the reason, and it should be held that a specific statement of grounds is only required when some statement of evidence is necessary to support it, and not when they rest entirely upon matter of record. It is a matter of practice not settled by any judicial opinion, and we should not be denied a hearing on the merits, by reason of having failed to add to a record of a verdict and judgment the useless formula "we assign as error that the verdict does not support the judgment."

II. The judgment is not supported by the verdict, and must therefore be modified. The verdict of the jury is conclusive of the facts when there has not been a motion for a new trial.

The judgment contained in the judgment roll, and the verdict brought up by the statement, constitute a complete basis for decision. The finding of facts, if properly part of the record by section three

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hundred and forty of the Practice Act, confirms what would be necessary presumption in its absence—that the Judge disregarded the verdict, and that there was no new trial moved for or ordered.

By the Court, WHITMAN, J.:

In this case, counsel for respondent move the Court “to strike out and disregard the statement on appeal,” because the same does not “state specifically the particular errors or grounds upon which the appellants intend to rely on the appeal.”

It was perhaps unnecessary to make the motion, for if well based, this Court has no power to consider such statement, as by the provisions of section three hundred and twenty-seven of title nine of the “Act to regulate Proceedings in Civil Cases in the Courts of Justice of this State, and to repeal all other Acts in relation thereto,” approved March 8th, 1869, “a judgment or order in a civil action * * * * may be reviewed as prescribed by this title, and not otherwise.”

Section three hundred and thirty-two of the same title provides: “When the party who has the right to appeal wishes a statement to be annexed to the record of the judgment or order, he shall within twenty days after the entry of such judgment or order prepare such statement, which shall state specifically the particular errors or grounds upon which he intends to rely upon the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified and no more.” *
* * *

It does not follow, that the statement may not contain all other matter necessary for explanation of its grounds of error; as for instance, the verdict of a jury, findings of fact and conclusions of law, when not made part of the judgment, minutes of the Court, etc.; but it must contain a specific statement of the particular errors or grounds relied on.

Unless, then, the paper offered as a statement complies with this section, it is no statement; it is not as “prescribed” by title nine, and, therefore, no proper aid to the review of the judgment or order appealed from. It is true, that under former statutes and the rules of this Court, a statement to be such should have contained the

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grounds of error relied on ; but a strict compliance with proper practice was temporarily waived by the lenity of the Court, though not without strong expressions of disapprobation. (*Hoopes v. Meyer*, 1 Nev. 433 ; *Gillig, Mott & Co. v. The Lake Bigler Road Co.*, 2 Nev. 214.) Now, however, probably with design to correct this course, by the Act above cited, the Legislature has required a specific statement of the particular errors or grounds relied on upon appeal, thus leaving no room for construction, or lax interpretation, and this Court has no choice but to follow and obey the law.

The so-called statement in the case at bar, contains neither any specific statement of particular errors or grounds relied on, nor any statement ; being simply a recital of the progress of the trial, and a detail of the matters occurring thereat, with exceptions taken therein to the rulings of the Court ; these not presented in the form of a bill, nor in any tangible manner, but simply noted in the course of the narrative. Such a paper must be disregarded ; because it is in no sense a statement, and this Court has no right to consider it, even if it wished.

The transcript contains a writing purporting to be the findings of fact and conclusions of law of the District Judge. This was probably inserted as being authorized by section three hundred and forty of title ten, of the Act previously referred to. If so authorized, it is not certified as by that section required, and therefore could not be properly considered ; but that section does not refer to findings of fact and conclusions of law, when it speaks of " any written opinion placed on file in rendering judgment."

Section one hundred and eighty-two of the Act referred to, defines such findings and conclusions as a " written decision," and concludes with the provision, that " judgment upon the decision shall be entered accordingly." This " written decision," is something which must precede the judgment, and upon which it is entered, as upon the verdict of a jury. The " written opinion " of section three hundred and forty is evidently something other ; as it is suggested as an act which may or may not have occurred. " If any written opinion be placed on file in rendering judgment or making the order in the Court below," is the language used, proba-

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bly referring to the reasoning or argument, for any decision, judgment, or order.

These findings and conclusions, then, are not before the Court. As the appeal is from the judgment, and there is no statement, nothing remains for examination but the judgment roll. (*Howard v. Richards & Richards*, 2 Nev. 129.)

In that no error appears. It is always disagreeable to decide a case upon a mere question of practice ; but in the present instance there is relief in the fact that the respondent should have recovered upon the evidence.

The judgment of the District Court is affirmed.

**T. WILCOX *et al.*, RESPONDENTS, v. JOHN T. WILLIAMS,
APPELLANT.**

CONTRACTS—LAW OF PLACE OF PERFORMANCE. A personal contract, which is, by its terms, to be performed in some place other than where it is made, is to be governed by the law of the place of performance.

STATUTES OF LIMITATION GENERALLY AFFECT THE REMEDY, AND NOT THE RIGHT. Statutes of Limitation apply only to the remedy on a contract, and not to the right or obligation ; so that, though the statutory bar has fully run against a contract where made, yet, if it is to be performed at another place, and it is not there barred, it may be enforced, provided the statute has not absolutely, by its terms, extinguished and nullified the claim itself.

PROMISSORY NOTE PAYABLE IN CALIFORNIA OR NEVADA. A promissory note, made in California, and payable "in California or Nevada," can at payer's option be paid in either State, and therefore cannot be construed into a contract to be performed in Nevada, so as to bring it within the purview of the rule touching the place of payment.

EFFECT OF NEW STATUTES OF LIMITATION. The Statute of Limitations in force at the time of suit brought governs the remedy on a contract: *provided*, in case of the passage of a new statute after the making of the contract, a reasonable time be given to bring suit.

CONSTRUCTION OF NEW STATUTE OF LIMITATIONS. The Statute of Limitations of 1862, (Stats. 1862, 82) which provided that suit should be brought on a contract made without the State within six months after the cause of action accrued, was amended in 1867 (Stats. 1867, 85) so as to extend the period of limitation on such contracts to two years: *Held*, that after the passage of the latter Act suit might be brought on any contract made out of the State, the cause of

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action on which had accrued within two years, though it might have been barred under the former statute.

STATUTE OF LIMITATIONS—NEW PROMISES. The Statute of Limitations (Stats. 1861, 31) excludes an acknowledgment or promise not in writing as evidence of a new or continuing contract to take a case out of the operation of the statute.

STATUTE OF LIMITATIONS—PART PAYMENT. Part payment is not sufficient as a new promise to take a case out of the operation of the Statute of Limitations.

STATUTE OF LIMITATIONS—ACKNOWLEDGMENTS MUST BE DISTINCT. An acknowledgment, to take a case out of the operation of the Statute of Limitations, must be clear, explicit, and direct to the point that the debt is due.

STATUTE OF LIMITATIONS—BURDEN OF PROOF ON NEW PROMISE. If a plaintiff, relying upon an acknowledgment in writing to take a case out of the operation of the Statute of Limitations, proves a general acknowledgment of indebtedness, the burden of proof is on the defendant to show that it related to a different demand from the one in controversy.

STATUTE OF LIMITATIONS—CONDITIONAL NEW PROMISE. A promise to pay, a debt when able, is not sufficient of itself as an acknowledgment or new promise to take a case out of the operation of the Statute of Limitations.

APPEAL from the District Court of the Second Judicial District, Douglas County.

This was an action brought by T. Wilcox and J. A. Brown, partners, doing business in the City of Placerville, California, under the name and style of Wilcox & Brown, against John T. Williams, on the promissory note set out in the opinion. Suit was commenced on May 3d, 1869. Findings and judgment for plaintiffs, and appeal therefrom.

Clayton & Davies, for Appellant.

I. The cause of action on the note was extinguished by the statute limiting the time of commencing civil actions. (Stats. 1867; 9 Cal. 89; 21 Cal. 149; 22 Cal. 102.)

II. The Court below erred in deciding that the note is subject to the same laws for the enforcement of its payment that it would have been had it been made in this State.

III. There was no acknowledgment of or new promise to pay said note after the twenty-first of July, 1868. (1 Peters, 351; 6 Watts, 219; 8 Conn. 185.)

IV. The Court below erred in deciding that the burden of proof rested on the defendant to show that the letter of the first of

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June, 1868, was not in relation to the debt intended to be secured by said note, and the fifty dollars thus remitted was not to be applied on said note.

V. The Court below erred in rendering judgment for the plaintiffs, for the reason, that if any new promise had been made by the defendant to the plaintiffs to pay the debt mentioned in the complaint, plaintiffs' action should have been based on the new promise. (*McCormick v. Brown*, Cal., April Term, 1869.)

VI. The full time required by law to bar this cause of action had run after the time of the passage of the Act of March 5th, 1867, and the commencement of this suit. (6 Cal. 430; 10 Cal. 373.)

Clarke & Wells, for Respondents.

I. Defendant pleads no "Act defining the time of Commencing Civil Actions," save the Act of March 5th, 1867, which was passed after the giving of the note sued upon, and is not retroactive. (4 Cal. 127; 1 Cal. 55; 28 Cal. 320; 9 Cal. 374; 6 Cal. 433.)

II. If a party seek the benefit of any Statute of Limitations he must bring that particular statute to the notice of the Court by special plea. (19 Cal. 85; 19 Cal. 476; 19 Cal. 423; 12 Cal. 311; 18 Cal. 67; 25 Cal. 89; 28 Cal. 106; 23 Cal. 16.)

III. But were we to admit that the Statute of Limitations applicable to the case, if any be so, is sufficiently pleaded to be entitled to consideration by the Court, still the facts do not bring the case within the statute, because:

1st. Of part payment and written admissions of defendant to plaintiffs of the continuance of the contract. (17 Cal. 574; 14 Pick. 387; 2 Pick. 368 and 581; 3 Pick. 291; 4 Pick. 109; 21 Maine, 176; Chitty on Contracts, 647; 19 Conn. 590; 6 Johnson, 270; 4 Johnson, 461; 2 Foster's N. H. 219.)

2d. The contract, though technically made in California, is, by its written terms, payable in this State, and is therefore governed by the laws of this State the same as if made here. If parties in making a contract express that it may be executed in another country or State than the one in which made, they place themselves and the contract under the operation of the law of the country or State

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where the contract is to be executed. (See Burrill's Law Dict., title *Lex loci contractus*; Story on Conflict of Laws, Secs. 242 and 280, and authorities there cited.) And in this respect the several States of the Union, on principles of justice and comity, are to one another as the different nations of the civilized and enlightened world are to one another. (See 4 Conn. 517; 8 Peters, 130.)

IV. The note sued upon being in terms payable in Nevada, is subject to our laws for the enforcement of the contract. (See 5 Johns. 239; 4 Cow. 508; Story on Prom. Notes, Sec. 165; 2 Kent's Com. 393, 394, and 459; 13 Pet. 65; B. Monr. 578.)

By the Court, WHITMAN, J.:

Appellant made and delivered his promissory note to respondents as follows:

“PLACERVILLE, July 11th, 1866.

“Ten (10) days after date without grace I promise to pay to the order of Wilcox & Brown two thousand seven hundred forty-nine (\$2,749⁸⁶/₁₀₀) eighty-six one hundredth dollars, for value received, with interest at ten (10) per cent. per annum until paid, in U. S. gold coin, in California or Nevada.

JOHN T. WILLIAMS.”

The evidence shows that it was so made and delivered, at the time and place stated, for a debt previously incurred at such place.

The complaint charges, and the answer does not deny, that payments were made on the note as per indorsements thereon, thus: “Paid November thirteenth, (13th) sixty-seven, (67) one hundred dollars; June second, sixty-eight, (68) fifty (50) dollars.”

Appellant pleaded the Statute of Limitations, and to support their action respondents read in evidence the following letters:

“WILLIAM'S RANCH,
Carson Valley, June 1st, 1868. }

“Mr. T. WILCOX—

“Sir: I am still alive, and that is about all too. I shall be over in about three weeks from this time, and I shall be certain to come and see you. I send you a check of fifty dollars now, and

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hope I can do something better for you then. I still remember past favors * * *."

"GENOA, April 18th, 1869.

"Mr. T. WILCOX—

"*Sir*: I have got the thing agoing to the best advantage to try to raise some money for you. Times are very dull. Money is scarcer than I ever saw it in my life. Hay trade is dull, but is improving a little. I shall be over as soon as the roads will permit of a team to come, after freight and a little grub, and I will do the best I can for you. I think I will be able to give you a lift—you can be sure I will do all in my power towards it, for I feel ashamed of it a standing so long; but hard times come a little too soon for me this time. But you have favored me very much, and I still hope I may be able to repay you for all of it soon. * * * *
* * * With this I close, by feeling under every kind of obligations to you for past favors."

The case was tried by consent without a jury, and respondents had judgment as prayed, for these reasons assigned by the District Judge:

"The defendant pleads the Statute of Limitations. The plea is not good, for two reasons: First, the note was made payable and is payable in this State, and is subject to the same laws for the enforcement of its payment that it would have been had it been made in Nevada; second, the preponderance of the evidence in the case, as shown by the letter of June 1st, 1868, is, that he, defendant, then and thereby acknowledged the continuance of the contract, and his obligation to pay the note; for he then sent them, the plaintiffs, fifty dollars, and promised more soon thereafter; and if that fifty dollars was not to be applied upon this note and debt, and if what he, defendant, said in said letter did not refer to this note and debt, he could and should have shown that fact on the trial, as he was sworn on his own behalf; and when questioned by counsel for plaintiffs on that point objected to answering, and was not compelled so to do."

Several specifications of error are assigned, which need not be considered separately, but will be passed upon generally, in the

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different propositions considered in reviewing the judgment appealed from.

The rule is, that a personal contract by its terms to be performed in some place other than that where the contract is made, is to be governed by the law of the place of performance; because from the language of the contract, it is presumed that the parties thereto intended to be governed by such law; and as far as a promissory note is concerned, the contract of which it is the evidence, is to be performed where payment thereof is to be made; but this rule applies only to the rights and obligations resting upon, or arising from, the contract; the law of the forum always governs the remedy in England and this country; and the Statute of Limitations applies only to a remedy, and not to a right or obligation. It was at one time doubted whether this rule would apply when the statutory bar had fully run against a contract when made; but the better opinion now is, that such fact makes no difference, and that the rule is unchanged, except when such statute absolutely by its terms and conditions extinguishes and nullifies the claim itself.

It would seem that the District Judge had not this distinction as to the rule of right and remedy in mind, when he found that the note in suit being payable in this State, was "subject to the same laws for the enforcement of its payment," as if here made; as thereunder he applies the Statute of Limitations governing contracts made in the State of Nevada, when, in fact, no matter where the contract was made, the Statute of Limitations of the forum would govern the remedy of collection by suit.

The rule is so well settled that there can be no question thereabout at the present day. (Parsons on Notes and Bills, Vol. 2, 382; Angell on Limitations, 56-67; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Williams v. Jones*, 13 East, 221; *Bank of the United States v. Donnelly*, 8 Peters, 361; *Pearsall et al. v. Dwight et al.*, 2 Mass. 84; *Putnam v. Dike*, 13 Gray, 535; *Thibodeau v. Lavasseur*, 36 Maine, 362; *Medbury v. Hopkins*, 8 Conn. 472; *State v. Swope*, 7 Ind. 91; *Hendricks v. Comstock*, 12 Ind. 238; *Ruggles v. Keeler*, 3 Johns. 268.)

As a matter of fact, however, the note is not payable at any particular place; the promise is to pay "in California or Nevada." It

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could, at the payer's option, be paid in either State. He could not be expected to seek to pay in any other place, but payment on his default might be anywhere enforced ; so that it cannot be properly said, that the note is to be treated with reference to the Statute of Limitations as if made in Nevada, because : First, the rule invoked has no application to such statute ; and, secondly, the note was in fact made in California, and the language used as to the place of its payment is too general to be construed into a promise to pay at a particular place, and thus bring the note within the purview of the rule touching place of payment.

It is urged by counsel for respondent, in escape from this position, that if the law be as stated, then the Statute of Limitations in force at the time of making the contract must govern, and as that is not pleaded the plea is bad ; but the opposite rule is settled upon the principle governing the application of the Statute of Limitations, that it affects only remedy and not right ; therefore, in England and this country, it is held that the statute in force at the time of suit brought must always govern : *provided*, only, that in the case of the passage of a new statute after contract made, reasonable time must be given to bring suit. (2 Parsons on Notes and Bills, 633 ; *State v. Swope*, 7 Ind. 91 ; *State v. Clarke*, 7 Ind. 468 ; *Brigham v. Bigelow*, 12 Met. 268 ; *Montgomery v. Chadwick*, 7 Iowa, 114 ; *Gilman v. Cutts*, 3 Foster, N. H., 376 ; *Fiske v. Briggs*, 6 R. I. 557.)

The note in suit being made and delivered in California, upon a debt there previously incurred, was subject at that time to the provisions of the Nevada statute of 1862 touching such contracts : *provided*, suit had been brought thereon in this State during the existence of such statute. Its language is as follows :

“An action upon any judgment, contract, obligation, or liability, for the payment of money or damages, obtained, executed, or made out of this Territory, can only be commenced within six months from the time the cause of action shall accrue.” Thereunder the note would have been barred January 21st, 1867.

On March 5th, of the year last named, the Legislature made this amendment : “An action upon a judgment, contract, obligation, or liability, for the payment of money or damages obtained,

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made, executed, or incurred out of this State, can only be commenced as follows: * * * within two years, in all other cases, after the cause of action accrued."

This then is the governing statute in this case, unless it follow that the note being absolutely barred before the passage of this amendment, it could not be in any manner affected thereby; but no party is compelled to plead the statute of limitations; no Court will infer from lapse of time apparent on the face of pleadings, that the statute has run. It must be brought affirmatively to the notice of the Court by the party seeking its protection, therefore it may be waived; and in the case at bar if it had been competent to have pleaded a statute repealed before suit brought, and before remedy sought in this forum, applicant must be considered to have waived the statute of 1862, and elected to plead that of 1867.

If this be not so, then another vexed question, and one claimed to be fatal to respondent's present right of recovery, arises; for the bar of the statute having absolutely run against the note before there was any pretense of a payment, it might be claimed, as it is by counsel for appellant, that this action should have been upon the new promise.

Authorities differ upon the question. In the case of *McCormick v. Brown*, (Cal. April Term, 1869) this language is used: "When the creditor sues after the statute has run upon the original contract, his cause of action is not the original contract, for his action thereupon is barred, but it is the new promise. There are many authorities the other way; some holding that the new promise takes the case out of the statute, others that it removes the bar of the statute, and others still, that it revives the original contract. But the better opinion is that the action is sustainable only upon the new promise, the original contract, or the moral obligation arising thereupon, binding *in foro conscientiae*, notwithstanding the bar of the statute being the consideration for the new promise." The weight of authority is clearly against the rule established in California. (Angell on Limitations, 232, Sec. 231; Parsons on Notes and Bills, Vol. 2, 653, note e.) It is proper to notice the objection though not necessary to the decision of the case, for the reason that no doubt is entertained either that the statute of 1862 was in no way

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applicable; or if applicable, then that appellant had the right to plead either statute he pleased, or neither if he so chose; and for the further reasons, which will appear in the consideration hereinafter touching the effect of the so-claimed new promises, acknowledgments, and payments.

What was the effect of the payments made, will be examined without reference to the time when they were made—whether before or after the bar of the statute had fallen—as that element in the view taken of this case does not properly occur, and will not be noticed further than as above.

The statute of this State is identical with that of California: “No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same be contained in some writing signed by the party to be charged thereby.”

To the decisions of that State one then naturally turns for light. *Pena v. Vance* is the leading case, and has been followed in California since pronounced. It clears away the doubts suggested by *Barron v. Kennedy*, (17 Cal. 574) and correctly decides the meaning of the statute. Justice Cope, delivering the opinion of the Court, well says:

“On examination of the matter a second time, we are satisfied that the statute intended to exclude all acknowledgments and promises not in writing, and that a promise implied from the fact of part payment cannot with any propriety be made an exception. The words of the statute are plain and unambiguous, and it is our duty to give effect to them, and carry out the intention of the Legislature as that intention has been expressed. Interpretation is only to be resorted to in cases of ambiguity, and it would be an evasion of the statute to hold that, notwithstanding the generality of the terms employed, cases of part payment are not included. The words are: “No acknowledgment or promise;” and part payment is mere evidence of a promise which is required to be in writing, and is not to be inferred from circumstances of which there is no written evidence. The English statute, (9 Geo. IV) commonly known as Lord Tenterden’s Act, is expressly limited to acknowledgments and promises in words only, and provides that noth-

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ing therein contained shall alter, take away, or lessen the effect of part payment. Our statute contains no provision of this character; nor is it limited to acknowledgments and promises in words only; its provisions are general, and exclude all acknowledgments and promises the evidence of which rests in parol merely." (*Pena v. Vance*, 21 Cal. 142; *Heinlin v. Castro*, 22 Cal. 100; *Fairbanks v. Dawson*, 9 Cal. 89.)

Examination of the statutes of the several States of this Union, will show that in none is the language used upon this head the same with that in the statutes of California and Nevada; or, if similar, there is some qualifying clause either identical with that of the statute, (9 Geo. IV) or of sufficient force to alter the clear meaning of the statutory language of the States last named; and it will be found that the decisions are based upon the statutory provisions, or the English rule. Take for instance the statute of Massachusetts as commented on in *Williams v. Gridley*. Reciting a clause of the statute similar to that of this State, Dewey, J., says: "It is quite obvious that this enactment has introduced a material change in the effect to be given to the statute of limitation of personal actions. It has, prospectively, legislated out of the judicial forum those numerous and somewhat perplexing cases of alleged new promises, either express or implied, sustained by oral admissions and statements by the party sought to be charged. Thus far the statute is plain as to the construction to be given to it. The question arises upon the further provision contained in section seventeen: 'Nothing contained in the four preceding sections shall alter, take away, or lessen the effect of the payment of any principal or interest made by any person.' (*Williams v. Gridley*, 9 Met. 482.) The only inference to be drawn from the opinion is, that in lack of section seventeen the decision would have been as in California. When Legislatures have so industriously excluded language settled by numerous decisions, it would be trifling with their action to hold it without meaning. If the Courts wrongly decide and fail to express the legislative intention, which seems too clear for doubt, additional enactments can correct the error.

It is contended that, aside from the payments, there are acknowledgments and promises in writing. The District Judge, in his

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findings, refers to the letter of June 1st, 1868. There are two in the evidence, which will both be examined to ascertain if they contain anything to sustain the judgment measurably predicated thereon.

There is no principle better settled than that an acknowledgment to take a case out of the statute, must be clear, explicit, and direct to the point that the debt is due. (Parsons on Notes and Bills, Vol. 2, 649; Angell on Limitations, 217; *Bell v. Morrison et al.*, 1 Pet. 351; *Venris v. Shaw*, 14 N. H. 422; *Berghaus v. Calhoun*, 6 Watts, 219; *Burr v. Burr*, 26 Penn. State, 284; *McCormick v. Brown*, Cal., April Term, 1869; *Hart v. Prendergast*, 14 M. & W. 741.)

It has been held in some cases that such acknowledgment must clearly appear to relate to the identical debt or demand which is sought to be recovered upon the strength of it; but the preponderance of authority is the other way. And it has been said "that where the plaintiff proves a general acknowledgment of indebtedment, the burden of proof is on the defendant to show that it related to a different demand from the one in controversy." (*Carr's Adm'r v. Hurlburt's Adm'r*, 44 Mo., 10 White, 264; see also 2 Greenl. Ev., Sec. 441; *Whitney v. Bigelow*, 4 Pick. 110; *Bailey v. Crane*, 21 Pick. 323; *Woodbridge v. Allen*, 12 Met. 470; *Frost v. Bengough*, 1 Bing. 266.) So the rule was properly stated by the District Judge in this case, had the facts warranted its application. It is, however, impossible to gather from the language of the letters any clear, explicit, or direct acknowledgment of any indebtedness, or, really, any definite acknowledgment whatever. Their language may as well, and perhaps better, apply to some favor the writer intends to show the person to whom they are addressed, in return for past favors from him, as to any debt he owes. They are not even directed to the payers of the note, but to one only; and the strongest expression used is: "I feel ashamed of it a standing so long."

No such vagueness meets the requirements of the law. Conjecture, aided by outside circumstances, might fix a meaning to these letters in consonance with the finding; but such conjecture, or such aid, is improper; the acknowledgment must point itself; it cannot be inferred, for its only purpose is as a base upon which to

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raise a promise, and it is not permissible to infer a foundation for the ultimate inference; and while the law allows a promise to be inferred from a proper acknowledgment, it draws the inference only in the absence of any express promise, either absolute or conditional, and considers the purpose of the acknowledgment always as extinguished by any accompanying words of promise.

What is the language of these letters? "I send you a check of fifty dollars now, and hope I can do something better for you then." "I have got the thing agoing to the best advantage to try to raise some money for you." "I will do the best I can for you. I think I will be able to give you a lift; you can be sure I will do all in my power towards it." "I still hope I may be able to repay you for all of it soon."

If any promise is expressed, by any or all the words recited, it is one conditioned upon ability. The language would seem to imply nothing but a hope, concerning some matter conjectural; but give it the strongest construction which could be claimed by the most sanguine, and at best it amounts only to a conditional promise. Such promise does not correspond with the complaint, and waiving that objection, could only be enforced upon proof of ability.

Without specially examining the many decisions, look at one of the earliest and one of the latest, holding this doctrine. In *Tanner v. Smart*, proof was, that the note was produced to the defendant, and payment of it demanded, and that the defendant said: "I cannot pay the debt at present, but I will pay it as soon as I can." There was no proof of any ability on the part of the defendant to pay the debt, and after argument of a rule *nisi* for a new trial, the plaintiff having had judgment, the rule was made absolute: Tenterden, C. J. saying, among other things, in support of his action: "The promise proved here was 'I'll pay as soon as I can;' and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise into one which was absolute and unqualified. Had it been in *terms*, what it is in *substance*, 'prove that I am able to pay and then I will pay,' it would have been what the promise was taken to be, in *Flaylin v. Hastings*, a conditional promise; and when the proof of ability should have been given, but not before, an absolute one. Upon a general

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acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied ; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule '*expressum facit cessare tacitum*,' apply." (*Tanner v. Smart*, 6 B. & C. 605.)

In *Bidwell v. Rogers*, a letter was introduced from the defendant, written in answer to one from plaintiff, saying : " I do not know when I can come and see you, but I will try to as soon as I can, and will pay you as soon as I can." Verdict being directed for defendant, and exceptions taken, overruling them, Chapman, J. pronounces the opinion of the Court, thus : " If the letter attached to the deposition had been proved, it would not have been sufficient to avoid the operation of the Statute of Limitations. It contains no reference to the note, or absolute promise to pay the plaintiff what is due to him ; but a promise to come and see him when he can, and to pay him when he can ; and no proof was offered of his ability to pay. (*Bidwell v. Rogers*, 10 Allen, 438 ; see also, *Bell v. Morrison*, 1 Peters, 351 ; *Haydon v. Williams*, 7 Bing. 163 ; *Hart v. Prendergast*, 14 M. & W. 741 ; *Hancock v. Bliss*, 7 Wend. 267 ; *Wakeman v. Sherman*, 5 Seld. 85 ; *Bush v. Barnard*, 8 Johns. 407 ; *Pritchard v. Howell*, 1 Wis. 131 ; *Manning v. Wheeler*, 13 N. H. 486.)

As the questions involved in this opinion are new in this State, though long since determined elsewhere, authorities have been somewhat numerous cited, culled from a multitude, tending to elucidation, and the weight thereof is conclusive against a recovery by respondent upon the present record. The statute was well pleaded, and nothing has been shown sufficient to remove its bar.

The judgment of the District Court is reversed, and the cause remanded.

Roney v. Buckland.

**JAMES F. RONEY, APPELLANT, v. S. S. BUCKLAND, RE-
SPONDENT.**

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JUDGMENTS NOT DISTURBED ON MEAGER GROUNDS. In an action against Buckland as surviving partner of the firm of Buckland & Bethel, it appeared in evidence that, in addition to the business of the firm, each of the partners was also engaged in separate business on his own account; that Bethel, being about to depart for San Francisco with the intention of laying in a stock of goods for the firm, Roney delivered to him a package of United States treasury notes and securities; that on his way to San Francisco Bethel lost his life; that after Bethel's death, Roney endeavored to collect his claim from his estate; and it did not appear what had become of the notes and securities after their delivery to Bethel: *Held*, that the evidence to show a delivery to or for the firm was too meager to justify a disturbance of the finding of the Court below in favor of the defendant.

OBJECTION THAT FINDINGS ARE CONTRARY TO EVIDENCE. Where the ground of an appeal is that the findings of fact are contrary to the evidence, the burden of showing error is upon the appellant, and a meager showing is not sufficient.

APPEALS in two cases from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion of the Court. Further information in relation to the facts referred to will be found in the report of the same case, on a former appeal, in 4 Nev. 45.

Aldrich & DeLong, for Appellant.

Does the evidence warrant the presumption that the money received by Bethel was received on partnership account? If it does, there being no evidence to overthrow it, it is insisted that the judgment should be reversed. It shows:

1st. The receipt of the notes and bonds by Bethel from Roney.

2d. That Bethel received them on the night immediately preceding the day of his departure for San Francisco.

3d. That Bethel left the next morning, carrying the notes and bonds with him.

4th. That it was the only object of Bethel, in his visit to San Francisco, to purchase the winter supply of goods for the firm of Buckland & Bethel.

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5th. That it was not known that Bethel was engaged in any other business, except mercantile business aforesaid, save a freighting business to the east of Fort Churchill, in which he was interested.

The rule of law on this subject as laid down in the text books, is, that a person who gives credit to one partner alone cannot call on the rest; but if there is no evidence to show to whom credit was given, the fact that money borrowed by a partner came to the use of the firm, raises a presumption that the loan was made to him as a partner, and if not rebutted will make the firm liable for the payment. (Parsons on Partnership, 106.)

So far as disclosed by the record, Bethel was engaged in no other business than the mercantile business of Buckland & Bethel, except the freighting business mentioned, which had no connection west of Fort Churchill. The avowed object of Bethel in his trip to San Francisco was to purchase the winter's supply of goods for the firm of Buckland & Bethel. He declared the object of his visit to San Francisco to be such. He was about starting on this trip for that purpose, and a few hours before his departure he borrowed the money in question and took it with him. No other object except the purchase of goods for the firm was mentioned. Is it not a fair presumption that Bethel intended to use the money borrowed for the benefit of the firm? Is it not at least a presumption calling on the respondent to show either that there was no necessity on account of the financial condition of the firm for the loan—or that Bethel had other business relations with San Francisco in which the money might likely have been used, or for which it might have been intended, to escape liability?

The money was brought to Bethel at night; he was to start very early the next morning, and it was natural that no very accurate understanding should have been disclosed either by writing or to those about the parties at the time. Bethel offered to give his or our note for the money, but Roney told him to let it stand until his return. There is nothing in the circumstances surrounding the transaction tending to give it the character of a private loan; on the contrary, everything to impress upon it the character of a loan to the firm.

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Williams & Bixler, for Respondent.

It is somewhat premature to discuss the question of whether the loan was made for the joint account of Buckland & Bethel, without first ascertaining that there was a loan. Greenleaf (2 Greenl. Ev. 108, Sec. 112) says: "In proof of the count for money lent, it is not sufficient merely to show that the plaintiff delivered money, or a bank check, to the defendant, for this *prima facie* is only evidence of the payment by the plaintiff of his own debt, antecedently due to the defendant." (See also 3 Phillips on Evidence, 426, 4th Am. Ed.; *Welsh v. Evans*, 1 Starkie, 474.)

The statement of facts reported in 4 Nev. 45, is not the statement of facts in the case as it now comes before the Court. All that now appears is that "plaintiff delivered money to Bethel," nothing more. That *prima facie* was only evidence of the payment of a preëxisting debt due from him to Bethel. What is there in the record to overcome that presumption? Nothing, unless the inquiry of Bethel as to whether he should give a note or receipt could accomplish that feat. If Bethel used the word *note*, then the creation of a debt was imparted; but if he said *receipt*, then a debt was being paid. Whose duty was it to show which word was used? Certainly not Buckland's.

Suppose, however, that the evidence had shown a loan to Bethel. Then the question would arise, to whom was the loan made? It cannot be claimed that it was in fact made otherwise than to Bethel only, but it is said that it was the account of the firm. What proof is there of that fact? He did not use the money for partnership purposes. It is not even shown that he ever took it from the safe. He did not state that it was intended to be used for partnership purposes, and the partner seems to have been entirely ignorant of the whole transaction. After he has started on his way to San Francisco, a package of money is handed to him—for what purpose no one knows—and yet we are told that should charge the defendant.

If there were any difficulty in the case, even conceding that the transaction amounted to a loan, that would be solved by the statement of plaintiff in his petition for letters, and in his complaint against the representation of Bethel's estate, in which he alleges a loan to Bethel, and to Bethel only.

Roney v. Buckland.

By the Court, JOHNSON, J.:

At a former term of this Court, the two cases now before us were considered—the defendant then the appealing party—in the reported case of *Roney v. Buckland*, (4 Nev. 45). In pursuance of the judgment of reversal and the opinion then pronounced, new trials were had by the Court below—jury trial being waived—in which the findings of fact and judgments were for defendant. Plaintiff moved for new trials, on several grounds, which were refused; and thereupon he appealed from both the orders and judgments. As the second trials were conducted in accordance with the law laid down in the opinion reversing said causes, the present appeals must be considered upon the several matters contained in the record now before us, irrespective of the cases made at the former hearing. It is stipulated that the two causes shall be heard together.

The complaint in the one action alleges a loan of five thousand dollars, in United States currency; and in the other, fifteen hundred dollars, Government bonds or securities, by the plaintiff, to one Henry Bethel, on or about the tenth of October, 1865, for account and use of the firm of Buckland (defendant) & Bethel, then partners in a mercantile business, being carried on near Fort Churchill, in this State; furthermore, alleging the subsequent death of said Bethel, demand, and non-payment.

The defendant is sued as surviving partner, to recover the amount of such loans, and value of the securities.

The partnership, demand, and refusal to pay, as alleged in the complaint, are not denied; but in other respects the answers fully traverse all of the material allegations. So, it rested with the plaintiff to make proof of the several averments denied by the answers. To this end it is shown, that on the evening of October 10th, 1865, the plaintiff brought to the Quartermaster's office, at Fort Churchill, where Bethel then was, (purposing to leave the following morning to buy a stock of goods) a package of greenbacks and Government bonds, corresponding to the amount and description stated in the complaints, and delivered them to said Bethel. Bethel, after the count had been made, inquired of Roney "if he wanted a receipt or note for them?" and Roney made answer,

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“that he did not think it was necessary.” Bethel then placed the package in the safe at the Quartermaster’s office, and departed the following morning for San Francisco.

There is no evidence in the present record that the package was taken by Bethel from its place of deposit, the Quartermaster’s safe. It was admitted on the trial that Bethel was killed by the explosion of the steamer “Yosemite,” on the twelfth of the same month, whilst *en route* to San Francisco.

It is further in proof that the defendant, apart from the firm business of Buckland & Bethel, was engaged in ranching, stock-raising, and hotel-keeping; and that Bethel was also engaged in a separate business—that of transporting goods for the Government, from Fort Churchill to other military posts to the eastward. It was also shown upon the trials, that plaintiff—after fully stating his case to counsel, subsequent to the death of Bethel and his knowledge thereof—applied to the proper Court for letters of administration on the estate of deceased, by petition, duly verified, in which he stated that he was a creditor of such estate, on account of the loan sought to be recovered in these actions; and at a later time, when letters of administration had been granted to another person, he brought suit against the administrator of such estate, on a verified complaint, to establish his claim as a creditor of the individual estate of the deceased, by reason of the same transaction. The latter suit, however, was dismissed before the commencement of these actions.

The appellant seems to have waived the other grounds of motion for new trials, in the lower Court, and here urges a reversal of the judgments on the one issue—that the findings of fact are contrary to the evidence. We have stated the evidence very fully on all material points, as we find it in the transcript. The proof is undoubted, that plaintiff delivered to Bethel the moneys and securities set forth in the complaint; but whether as a loan does not appear, and there is too meager a showing to justify the conclusion that Buckland is chargeable as copartner of Bethel. The authorities cited on behalf of appellant fully support this view.

Judgments affirmed.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEVADA,

OCTOBER TERM, 1869.

5	224
5	256
6	57
10	19
10	170
5	224
21	491
21	506
34*	389
34*	395
5	224
23	42
23	48
33	52

THE YELLOW JACKET SILVER MINING COMPANY, RESPONDENT, v. C. C. STEVENSON, APPELLANT.

AGENCY—PRINCIPAL NOT BOUND BY AGENT'S UNAUTHORIZED ACTS. A principal is only bound by such acts of his agent as are within the scope of the agent's authority.

AGENCY—RATIFICATION. A principal is only held to ratify an unauthorized act of an agent when he does so expressly; or with full knowledge of the transaction accepts or receives some advantage from it; or when, within a reasonable time after such knowledge, he fails to repudiate it.

RATIFICATION OF AGENT'S UNAUTHORIZED ACTS—FULL KNOWLEDGE. Though a principal receive advantage from an unauthorized act of an agent, he will not be held to ratify it unless he accept the advantage with full knowledge of all the material facts of the transaction.

CORPORATIONS—UNAUTHORIZED LEASE BY PRESIDENT—PRESUMPTIONS OF RATIFICATION. Where the President of a mining corporation leased, in the name of the company but without its authority, certain of its mining ground, and the money paid as rent was returned as "money received for ores sold:" *Held*, that the mere fact of the receipt of the money, without proof of knowledge of the lease on the part of the company, was not sufficient proof from which to infer a ratification of the lease, nor a sufficient showing from which to infer the relation of landlord and tenant so as to entitle the occupant of the ground to notice to quit.

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CORPORATIONS NOT CHARGEABLE WITH KNOWLEDGE OF INDIVIDUAL TRUSTEES. On a question as to the ratification by a corporation of the unauthorized act of its President, where it is necessary to show knowledge on the part of the corporation, it is not enough to show an individual knowledge on the part of the minority of the Board of Trustees, even if a knowledge on the part of all of them in their individual capacity, and not acting as a Board, would be sufficient.

ENTRY UNDER VOID LEASE—TENANCY AT WILL. The rule that a tenancy at will is created where a tenant enters upon property under a void lease, and as such tenant at will is entitled to notice to quit, does not apply to a case of entry under a lease made by a pretended agent acting entirely without authority from the owners.

APPEAL from the District Court of the First Judicial District, Storey County.

The complaint charges the defendant with having unlawfully entered into, and unlawfully continuing and threatening to continue in, the possession of a portion of the Comstock Ledge in the Gold Hill Mining District in Storey County, known as the West or Red Ledge, and with extracting therefrom, removing, and appropriating to his own use, and threatening to continue to extract, remove, and appropriate, thirty tons per day of metalliferous quartz rock and earth, worth eighteen dollars per ton. After the argument of an order to show cause, an injunction was granted against defendant, to be and remain in force during the pendency of the action, and until the further order of the Court, from which order of injunction this appeal was taken.

Williams & Bizler, for Appellant.

I. The Board of Trustees ratified the lease made by Winters by accepting the "rent" from appellant. They knew he was at work upon and occupying a part of their mine, and that they were receiving "rent" for its use. It was their duty to have ascertained from their President the terms of the occupation, and the law will presume they did so.

II. The occupation of a mine paying a fixed sum for use becomes à lease. (*United States v. Gratiot*, 14 Pet. 526, 538-9; *Harlen v. The Lehigh Coal Co.*, 35 Penn. 287 and 292; *Tiley v. Moyers*, 43 Penn. 404 and 410; *Cross v. Tome*, 14 Md. 217.)

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III. The acceptance of rent from one occupying land, houses, or mines, claiming to occupy as lessee, makes him a tenant of the property, and as such tenant he cannot be ejected without notice to quit, which notice must be given six months before the intended termination of the "term." (1 Washb. on Real Prop. 396, and Note 3; 1 Washb. on Real Prop. 393; Adams on Ejectment, 106, 108, 111, and 112; 1 Cowen's Treat. 303; 14 Allen, Mass. 45; 23 Wend. 616 and 618; Taylor's Landlord and Tenant, 35; *Frisbie v. Price*, 27 Cal. 255; *Murray v. Armstrong*, 11 Mo. 209; *Ridgley v. Stillwell*, 28 Mo. 400; *Searlly v. Murray*, 34 Mo. 420; *Squires v. Huff*, 3 A. K. Marsh. 943; *Fogle v. Chany*, 12 B. Mon. 139; *Sullivan v. Enders*, 3 Dana, 66; *Denn v. Drake*, 2 Green, N. J. 523; *Denn v. Blair*, 3 Green, N. J. 181; *Doe v. Richards*, 4 Ind. 374; *Jackson v. Hughes*, 1 Blackford, 421-2; Bouvier's Dict. 15 and 16, word "Lease;" Bouvier's Dict. 446, word "Rent.")

IV. But if the lease was void for want of authority to make it, or as not having been ratified, then the acceptance of "rent" made appellant tenant at will, or from year to year, with right of notice to quit. It must be borne in mind in determining whether the money paid to respondent was "rent money" that appellant so paid it, understanding and holding himself out as the tenant of respondent; and respondent introduced no evidence showing or tending to show that it was received for any other purpose or upon any other contract. We were therefore tenants of some sort; and if the written lease was not valid, we were nevertheless entitled to reasonable notice to quit before suit could be brought. As we had no notice whatever, the action was prematurely brought, and the injunction improperly issued.

C. J. Hillyer, for Respondent.

I. There was no valid written agreement. The pretended lease was not one which the President could make by virtue of his official position. (Angell & Ames on Corp., Sec. 297; *Blair v. B. R. Co.*, 20 Cal. 602; *Fulton Bank v. N. Y. & S. C. Co.*, 4 Paige's Ch. 132; *Hoyt v. Thompson*, 1 Seld. 322; 7 Conn. 219; 12 N. H. 205; 20 Vt. 446.)

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II. There was no ratification. Ratification to be valid must be made with full knowledge. The proof shows that there was no knowledge on the part of any Trustee, except the officer making it, either of the written agreement, or of any agreement, allowing Stevenson either any definite amount of ground or a privilege for any length of time. Every act done by the Board in the reception of money, the approval of accounts, etc., was entirely consistent with the non-existence of any agreement, and therefore no assent to its terms can be implied, and no obligation of inquiry in relation to it was imposed. (Angell & Ames on Corp., Sec. 304; Paley on Agency, 171; Story on Agency, Secs. 239, 242-3; 6 Cushing, 409; 26 Wis. 102; 22 Pick. 31; 9 Ban. [Penn.] 27; 30 Barb. 575; 8 Gill & John. 248.)

III. The written agreement being void as a contract, it cannot be considered in the case for any purpose. It is not like the case of a lease made by one having authority, but void for want of form. There, if a tenancy is created by a delivery of possession, and the acceptance of rent, the paper may be sometimes resorted to, to ascertain the terms of the tenancy. The reason is that the proper authority has created the tenancy by its acts, and that the same authority has assented to and fixed its conditions by a paper expressing them correctly, but void for want of form. Here the proper authority has never seen or known of the writing, and could not have assented to any of its terms. The paper is, therefore, as to the company, as if it had never been written, and the rights of the parties must be determined by the other facts appearing in proof.

IV. The relation of landlord and tenant never existed between plaintiff and defendant. The only authority having the power to place him in possession was the Board of Trustees, deriving their power from the statute. If the defendant desired to show that this power was vested in any other officer, it was incumbent upon him to prove that this act was within the recognized sphere of duty of such officer. In the absence of proof the Court cannot present it; and if it could, it would be a forced and unnatural presumption that an inferior officer should have the power to dispose of the possession of the whole or any part of the mining claim of a corporation.

The relation of landlord and tenant can only be created by con-

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tract. The contract can only be implied from acts which from their inconsistency with any other probable supposition compel or persuade to the conclusion that the parties consented to the relation, and that it was their intention that it should exist. (Taylor's Landlord and Tenant, Secs. 24 and 25; 15 Wend. 379; 1 Hill, 234; 5 Bing. 694; 7 Scott, 855.)

V. In the absence of the relation of landlord and tenant, there is no basis for what is termed the equitable right to continue to take out ore for a reasonable time. He was either a trespasser to be stopped at any time by the Court, or if within the scope of his duty the Superintendent permitted him to take out ore, it was equally within the scope of his duty when he told him to stop.

By the Court, LEWIS, C. J.:

In the month of January, A.D. 1868, John B. Winters, the President of the Yellow Jacket Mining Company, executed in the name of the respondent an instrument whereby the appellant was given the privilege of entering upon a certain designated portion of respondent's mining ground, with the privilege of mining and appropriating to his own use all mineral-bearing rock which might be found therein, for the sum of two dollars per ton for all ore so mined and taken by him. Under this instrument, which by its terms was to continue during his pleasure, the appellant entered upon, mined, and extracted a large quantity of ore, and was so engaged when this suit was instituted for the purpose of enjoining him from further entering upon, mining, or taking ores. The proceeding is founded upon the assumption that Winters was not authorized to execute the instrument or lease referred to on behalf of the company, and hence it is not holden upon or bound by it.

The evidence undoubtedly sustained this position. Winters, himself, testified that he had no authority to execute such an instrument on behalf of the company, or to lease any portion of the mine, and the by-laws introduced show that such power is vested only in the Board of Trustees, which it is admitted never delegated it to him. Not possessing the authority to act for the company in the execution of such instrument, it could not be bound by it; for it is

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an axiom of the law of agency that the principal is only bound by such acts of the agent as are within the scope of his authority. But it is argued for appellant, that a corporation, like a natural person, may ratify an unauthorized act of its agent; and in this case the respondent ratified the instrument executed by Winters. That it might have been adopted or ratified by the company and thereby become its own act, and binding upon it, there is no doubt; (that it was done however in this case is not established to our satisfaction.) A principal is only held to ratify the unauthorized act of an agent when he does so expressly, or, (with full knowledge of the transaction, accepts or receives some advantage from it,) or (when within a reasonable time after such knowledge he fails to repudiate it.)

Although the principal received advantage from such act he will not be held to ratify it, unless he accept it with full knowledge of all the material facts of the transaction.

“No doctrine,” say the Supreme Court of the United States, “is better settled, both upon principle and authority, than this, that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown the ratification is treated as invalid because founded in mistake or fraud.” (*Owings v. Hull*, 9 Pet. 629.) So where it is sought to charge a corporation with the ratification of an unauthorized act of an agent by reason of its acceptance of some benefit or advantage from it, it should appear that such benefit was accepted with full knowledge of the character of the act. (Angell and Ames on Corp., § 304.)

The evidence in this case, however, is clear and positive that the Board of Trustees which was the authorized agent of the corporation knew nothing of the terms, nor even of the existence of the lease in question. The money paid by the appellant was reported by the Superintendent to the Board as received for ores sold. Nothing seems ever to have appeared in his reports from which it could even have been inferred that the money paid by, or due from, Stevenson to the company was for the use or rental of any portion of the mine. How then can it be held that the acceptance of money by the Board reported to it as being for ores sold was a ratification

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of the lease executed to the appellant? The company did not know of such lease, nor were there any such circumstances connected with the acceptance of the money as to place it upon inquiry, or to charge it with presumptive notice of its existence.

If, then, it be the law that there must be a full knowledge of all the material facts before the acceptance of profit or advantage by the principal will be held to constitute a ratification, surely the respondent here cannot be held upon the lease in question, for it knew nothing of the material facts respecting it. If it were shown that the Board knew of the lease, the acceptance of payment from Stevenson for the ore extracted would doubtless be sufficient to establish a ratification; but the contrary being shown, it would manifestly be opposed to the well-settled rules of law to hold such acceptance to be a ratification.

But it is further claimed that if the lease were void and there were no ratification, still the acceptance of rent from Stevenson constituted him a tenant at will of that portion of the mine from which he was extracting ore, and therefore entitled him to notice to quit, which was not given. The fallacy of this argument is, that it assumes the corporation accepted the payment made by Stevenson *as rent*, when nothing of the kind is shown. True, the money was paid, but as stated before, it was reported to the Board as money received for ore sold, and not as rent for the use or occupation of any portion of the mine. It is not shown that the Board of Trustees had any knowledge that he had such use or occupation. The acceptance of money as rent, knowing it to be such, would undoubtedly create the relation of landlord and tenant as completely as an express contract, because the payment by the tenant would be a direct recognition and acknowledgment of the landlord's title, and the acceptance by the latter of such payment knowing it to be paid as rent, would be as perfect a recognition of the tenant's right to occupy as an express assent or permission; consequently it has been held, and very justly too, that the acceptance of rent, knowing it to be paid as such, creates the relation of landlord and tenant.

But the acceptance of money by the owner of land—not knowing it to be paid as rent, or believing it to be paid for something else—cannot be held an assent to the use or occupation, nor create

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such relation. (*Doe v. Crago*, 6 Manning, G & S. 90.) Not knowing of such occupation, an assent to it could not, with any degree of consistency, be presumed to be given. Here, there is no evidence that the Board of Trustees, as such, knew of Stevenson's occupation; and the acceptance of the money, paid by him, could not raise a presumption of such knowledge: because it was returned as for ores sold, and as such it appears to have been accepted by the company. Were it returned as rent and so accepted, a tenancy would be created—for that fact alone would be a sufficient notification to the company that Stevenson was occupying a portion of the mine, and the acceptance of the rent would be a sufficient assent to such occupancy. But the law does not force contracts upon persons by presumptions unnatural or improbable. Legal presumptions are natural and rational inferences drawn from known or admitted facts. As for example: if one accepts *rent* from another in possession of his property, knowing it to be paid as rent, the natural presumption is that he assents to the possession—and such is the presumption of the law; but it would not be rational or natural to infer an assent to such possession if the money were accepted, the owner not knowing it was paid as rent; nor do we think the law raises it in such a case.

Perhaps, if it were shown that money was paid by one occupying premises, as rent, and that it was accepted by the owner, with nothing further appearing, it might be presumed that the owner knew it to be intended as rent, and so accepted it; but where, as in this case, it is shown, in connection with the proof of payment, that it was reported to be for something other than rent, and so received, such presumption cannot be indulged.

It cannot, we think, be maintained that the knowledge obtained unofficially by three of the trustees, that Stevenson was engaged in extracting ore from the mine, is sufficient to charge the company with such knowledge. As any number of trustees, acting individually and not as a Board, cannot act for the corporation—so, any information obtained by individual trustees and not communicated to the Board, should not, it would seem, become the foundation of a contract binding upon the company. The trustees represent the corporation, only when assembled together and acting as a Board.

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(Laws 1864-5, 360, Secs. 5 and 7. See also, *Gashwiler v. Willis*, 33 Cal. 11.) Such being the law, how can it be claimed that information communicated to them individually, but not to the Board, can be made the foundation of an implied contract on the part of the corporation? But, however this may be, it cannot possibly be maintained that a corporation can be charged with acting upon, or recognizing a fact, which is known only to a minority of its trustees. As it requires a concurrent action of a majority to execute an express contract on its behalf, the action of, or information communicated to, any number less than a majority, cannot become the basis of a contract binding upon the company. In this case the three trustees, who knew that Stevenson was extracting ore from the mine, might be deemed to assent to it—still, unless they constitute a majority of the members of the Board, their action or implied assent could no more bind the corporation than an express contract entered into by any one of them alone could. The record here does not show that three were a majority of the Board of Trustees of the plaintiff—a fact necessary to be shown by the defendant, before he could claim the corporation to be bound by their act, or be chargeable with information obtained by them. So, even if it were admitted that the act of a majority of the trustees, not acting as a Board, could bind the corporation, still, as it is not shown in this case, that a majority did so act, or have knowledge of Stevenson's possession, the result here would be unchanged.

The authorities referred to in support of the proposition, that one entering under a void lease is to be deemed a tenant at will, and so entitled to notice to quit, have no pertinency to the facts of this case. When an owner allows one to enter upon his property, under a lease rendered void by reason of some informality, undoubtedly a tenancy at will may thereby be created—because, although the lease intended to be executed be nugatory, still the ontry and taking of possession are by the permission of the owner; and in such case the tenancy is created by the acts of the respective parties, irrespective of the lease attempted to be executed. The case is, however, very different where there is not only a void lease, but the entry upon the premises is also unauthorized. As for example: if a stranger to the owner should, on his behalf and in his name, make

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a lease of his property, and the lessee should enter into possession under it, he could certainly not be held a tenant at will, and entitled to notice to quit from the owner. But the President of the plaintiff had no more authority to lease any portion of its mine than if he were an entire stranger. Not having the authority to lease, it follows he had no authority to place any person in possession of the mine, or any portion of it, *as a tenant*—for such possession can only be derived from one having the right or authority to lease—hence, not only was the lease executed by Winters void, but any possession given to, or right of tenancy attempted to be conferred upon, Stevenson, by him, was entirely unwarranted. There could, therefore, be no tenancy at will created by means of the possession so obtained. If Winters had the authority to lease and did so, placing the defendant in possession, and the lease, by reason of some informality, proved to be void, doubtless, Stevenson would in such case be held a tenant at will: but Winters having no such authority, Stevenson could acquire none of the rights of tenancy from him—for as an agent, Winters could no more bind his principal by giving a possession which would create a tenancy, than by executing a written lease of the premises.

The appellant having failed to establish the relation of landlord and tenant between himself and the respondent, and this being the only ground relied on, the order of the lower Court against him must be affirmed.

ABRAHAM HOPPER, RESPONDENT, v. RICHARD R. PARK-
INSON *et al.*, APPELLANTS.

MORTGAGE TO SECURE PURCHASE MONEY NOT A VENDOR'S LIEN. A suit to foreclose a mortgage given to secure the purchase money of land, is not a suit for the enforcement of a vendor's lien.

NO HOMESTEAD AS AGAINST LIEN FOR PURCHASE MONEY. There can be no homestead right acquired in property as against the purchase money unless the lien therefor, whether created by mortgage or existing by way of vendor's lien, has been relieved in some lawful way.

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FORECLOSURE OF MORTGAGE FOR PURCHASE MONEY. In a foreclosure suit on a mortgage given by a husband to secure the purchase money of land, and made contemporaneously with the deed of the land to him, the wife, being admitted to defend, set up a homestead right: *Held*, that neither husband nor wife could acquire any homestead right as against the mortgage debt.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

Clayton & Davies, for Appellants.

The property sought to be subjected to the payment of this debt is a homestead. (4 Cal. 268; 6 Cal. 234; 10 Cal. 296; 3 Nev. 182.)

A mortgage of a homestead, less than five thousand dollars in value, signed by the husband alone, is absolutely void. (Stats. 1864-5, 226; 8 Cal. 66; 12 Cal. 327; 33 Cal. 266; 1 Nev. 568 and 607.)

A vendor's lien does not exist where a mortgage security is taken for the purchase money. (12 Cal. 301; 17 Cal. 70; 23 Cal. 633.)

R. M. Clarke, for Respondent.

The obligation in suit being for the purchase money, no exemption exists. "For the payment of obligations contracted for the purchase of said premises," they are always, and under all circumstances, liable to forced sale. (Const., Art. 4, Sec. 30.) No homestead exemption exists as against the purchase money. Independently of the provision of the Constitution, which is deemed conclusive, the deed and mortgage being simultaneous and parts of the same transaction, the homestead right is subject to the mortgage. (*Lassen v. Vance*, 8 Cal. 271; *Carr v. Caldwell*, 10 Cal. 380; *McHendry v. Reilly and Wife*, 13 Cal. 75.)

By the Court, JOHNSON, J.:

On the twenty-fourth of April, 1865, Hopper, the respondent

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herein, sold to Richard R. Parkinson, one of the appellants herein, a lot of land in Carson City and improvements thereon, including a dwelling house. A deed of conveyance in the ordinary form was executed, but no part of the purchase money being paid, said Parkinson made his promissory note for the amount expressed in the deed as the consideration of such sale, and also executed a mortgage to Hopper on the property so conveyed, to secure the payment of said note. The deed, note, and mortgage are of corresponding date. The appellants are husband and wife, and in such relation were living in said Carson City at the date of these transactions.

After maturity of the note and its nonpayment, Hopper brought suit against the maker thereof to recover judgment upon the note, and for a decree of foreclosure against the mortgaged property. Thereupon, the wife, Ellen Mary Parkinson, appeared, and of her own motion was made codefendant in the action. The joint answer of these defendants admits all of the issuable averments contained in the complaint: but by way of defense to the foreclosure proceeding, they set up in themselves a homestead right to the mortgaged premises, and ask that it may be adjudged good as against said mortgage. The answer alleges the marital relations of the parties defending, such as to entitle them to claim the benefit of our homestead laws: "That from, on, and since the twenty-fourth of April, 1865, they, with their family of children, have continuously resided and lived upon said premises, and have since said time occupied said premises as a homestead; and that they do now claim, hold, and occupy the same as a homestead, and that on the ninth of March, 1869, Ellen Mary Parkinson, one of said defendants, made and filed in the proper office, in due conformity with law, a statement declaring her intention to hold and claim said premises as a homestead." The value of the property, it is conceded, does not exceed five thousand dollars.

By consent the issues of fact were tried by the Court, without a jury, and thereupon the findings were in accordance with the allegations of the complaint, fully covering the averments therein stated, "that the note and mortgage were executed simultaneously, and to secure the payment of the purchase money of the aforesaid premises." The Court furthermore found, in respect to the new matter alleged

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in the answer: "That from and since the said twenty-fourth of April, 1865, the defendant, with his wife and family, has continuously resided upon the premises described in the complaint, and occupied the same as a homestead." Also found the further fact that the wife, on the ninth of March, 1869, made the declaration as provided by statute, claiming the mortgaged premises as a homestead for the use of herself and family. Upon these findings, judgment was rendered for the amount of the note and accrued interest; also, decreeing the sale of the property in satisfaction of such judgment. From the decree ordering the sale of the mortgaged property defendants bring this appeal.

The argument in support of the appeal presents the following points: "*First*, the property sought to be subjected to the payment of this debt is a homestead; *second*, a mortgage of a homestead not exceeding five thousand dollars in value, executed by the husband alone, is absolutely void; *third*, a vendor's lien does not exist where mortgage security is taken for the purchase money."

In respect to a vendor's lien—taking up the several propositions in the most convenient order—it is sufficient to reply, that the question is not involved in this case. The action is not for the enforcement of a "a vendor's lien," in the distinctive sense that term is used, but the proceeding is simply in the form authorized by the statute where a debt has been secured by mortgage on real property. The pleadings, judgment, and decree, properly so treat it. So the argument and authorities directed to this point have no bearing upon the case in hand.

The other two points, and the argument of counsel in support of them, are founded mainly on the theory that the findings of fact (for beyond such finding, in respect to matters of fact, we cannot look, seeing that in no way has the evidence been brought up) show, that at the time said mortgage was executed—the twenty-fourth of April, 1865—the appellants had acquired a homestead right to the property in question. To this it is replied by opposing counsel, that, at best, defendants are only shown to have a homestead therein commencing on the twenty-fifth of April, 1865, as the language used in the finding "from and since the twenty-fourth," excludes the *twenty-fourth*, and is equivalent to fixing

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upon the *twenty-fifth*, the day after the mortgage was executed, as the earliest period any such right existed, and consequently it cannot stand in the way of the antecedent mortgage, though executed by the husband alone. Perhaps, as there seems to be some conflict of authority upon the question, it is one not free of doubt; and as we propose to determine the case at bar upon broader grounds, embracing the entire merits, it is not necessary at this time to express an opinion upon that point.

The exemption claimed by defendants in this case must be tested by the constitutional and statutory provisions pertaining to homesteads.

Section thirty, article four of the Constitution, provides that "a homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon." * * *

The Act approved March 6th, 1865, (Stats. 1864-5, 225, Sec. 1) declares that "a homestead consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subjected to forced sale on execution, or any final process from any Court." * * *

Section two (Stats. 1864-5, 226) provides that "a mortgage or alienation to secure the purchase money, or pay the purchase money, shall be valid if the signature of the wife be obtained to the same." * * *

Defendants' counsel, proceeding upon the theory that immediately upon the execution of the deed a homestead right vested in defendants, insists that *any* mortgage is void as against such right, unless the wife joins in its execution, in pursuance of section two of the Act above quoted. But the difficulty lies here. The premises are wrong. There can be no such thing as a homestead right as against the purchase money, unless the lien, whether created by mortgage or existing by way of a vendor's lien, has been relieved in some lawful way.

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In this case, as we have seen, the vendor made a deed without receiving any part of the purchase money, but contemporaneously with the execution of such deed took a mortgage from his vendee covering this identical property to secure this payment of the purchase money. These several acts were but parts of the same transaction. The husband had acquired no homestead right when he made the mortgage as against the debt thus contracted, nor was the condition of the wife different. Perhaps the property may have become impressed with the character of a homestead in respect to other debts, yet the exemption here claimed must be held subordinate to the mortgage; for no homestead claim could be made until after the purchase was fully effected, to wit: the payment of the purchase money. (*McHendry v. Reilly and Wife*, 13 Cal. 75; *Peterson v. Hornblower*, 83 Cal. 275.)

“And, even if executed subsequently to the declaration of homestead,” as aptly expressed by Justice Rhodes in the case last cited, “it would be held by any Court in which it might be foreclosed, upon the plainest principles of equity, to have priority over the homestead claim, unless the Court was prepared to hold that the Act was a legislative device to enable purchasers to swindle vendors.” The circumstances, as well as the constitutional and statutory provisions reviewed in the case last referred to, are somewhat different from the one at bar; but, nevertheless, the governing principles are the same, and fully warrants a like conclusion.

It follows, therefore, from the views herein expressed, that the decree must be affirmed.

It is so ordered.

JOSEPH A. TODMAN, RESPONDENT, v. H. H. PURDY,
APPELLANT.

PRESUMPTION OF OWNERSHIP IN HOLDER OF PROMISSORY NOTE. In a suit on a promissory note by the payee, his possession thereof, though it may bear his indorsement to another person, sufficiently establishes his title to it without further proof—the law presuming the holder to be the owner.

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PREJUDICIAL ERROR ONLY AVAILABLE ON APPEAL. Though improper evidence may be admitted on the trial of a case, yet if its admission could in no wise injure the opposite party, he has no cause of complaint therefor—no error, except such as may have prejudiced appellant's case, being available on appeal.

PLEADING AND PROOF OF OWNERSHIP OF PROMISSORY NOTES. In a suit by the payee on a promissory note, which appears to have been indorsed by him to a third person, the plaintiff's production thereof will raise the presumption that he is the owner without further proof; but if it should become necessary to prove a transfer back to himself he can do so without specially pleading it, any proof tending to establish his ownership, whether shown by oral evidence or indorsement on the instrument, being admissible to sustain the allegation of his being the owner and holder thereof.

FACTS NOT REQUIRING PROOF REQUIRE NO PLEADING. No fact is required to be pleaded which it is unnecessary to prove.

STATUTE OF LIMITATIONS—ABSENCE FROM STATE. A defendant, to avail himself of the bar of the Statute of Limitations, must have been within the State for the full time limited by the statute after the cause of action accrued against him.

CONSTRUCTION OF SECTION TWO OF STATUTE OF LIMITATIONS. Section twenty-one of the Statute of Limitations (Stats. 1867, 86) has entirely overthrown the old rule that the statute, when once it began to run, continued to run, notwithstanding absence from the State.

APPEAL from the District Court of the Third Judicial District, Washoe County.

This action was brought on two promissory notes executed on June 6th, 1864, at Silver City, for five hundred dollars each, drawing three per cent. per month interest, and payable, one in six months, and the other in eight months. The plaintiff had judgment in the Court below, on June 24th, 1869, for the sum of two thousand seven hundred and eighty-five dollars, certain small offsets having been allowed.

R. H. Taylor, for Appellant.

I. The Court erred in overruling the objection to the question: "What disposition did you then make of these notes?" because no evidence of transfer from and to plaintiff was admissible, inasmuch as the plaintiff declares upon the notes as the original holder thereof, and not as assignee of them. (Chitty on Bills, 571.)

II. The decision is against law, because the findings of fact in relation to the return of defendant to this State show that his pres-

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ence here put the Statute of Limitations in motion, and that the action was barred by said statute. (Stats. 1867, 86, Sec. 7; Angell on Limitations, Sec. 206.)

Thomas E. Haydon, for Respondent.

I. To the first point of appellant, respondent cites 2 Greenl. Ev. 163, Sec. 166, and note 3 thereunder.

II. To the second point of appellant, respondent cites 8 Abbott's N. Y. Digest, 724-6, Secs. 130-1, 134, 144-5, and 146, and cases there cited, and particularly *Denny v. Smith*, (18 N. Y. 570) and *Ford v. Babcock*, (2 Sandford, 526).

By the Court, LEWIS, C. J.:

Upon the trial of this case it appeared in evidence that in the month of May, A.D. 1866, the plaintiff, who was the original payee of the notes sued on, had indorsed and transferred them to one H. P. Sheldon, whereupon his counsel offered evidence to show that he became the owner of them by a subsequent transfer to him by Sheldon. This was objected to by counsel for defendant, upon the ground that plaintiff, not having pleaded the indorsement from Sheldon to himself, evidence tending to establish that fact was inadmissible. The Court below overruled the objection and admitted the evidence. Of this ruling the defendant complains, and assigns it as error in this Court. That such evidence was entirely unnecessary is very certain, for the production of the notes by the plaintiff sufficiently established his title to them without further proof, the law presuming the holder of a negotiable note to be the owner. When, therefore, the payee sues upon it he is allowed to recover, notwithstanding it appears to have been indorsed by him to a third person, without further proof upon his part as to his ownership than the production of the instrument. In *Dugan v. The United States*, the rule is thus stated by the Supreme Court: "But if this agency in the Messrs. Willinks and Van Staphorst were not established, the opinion of the Court would be the same. After an examination of the cases on this subject, (which cannot all of them be reconciled) the Court is of the opinion, that if any

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person who indorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorseees, whose names he may strike from the bill or not, as he may think proper." (3 Wheat. 178.) *Lonsdale v. Brown*, (3 Wash. C. C. R. 404) was an action against the drawer of a bill of exchange in favor of the payee. "The bill was indorsed in full by the plaintiff to O'Neil, and by O'Neil to one Chancellor. The plaintiff offered the deposition of O'Neil to prove that no consideration passed from C., but that the bill was indorsed to him as agent merely, to receive the amount on account of the indorser. This evidence was objected to on the ground that it was calculated to discredit negotiable paper, on which the witness had placed his name; but Judge Washington, in deciding the question, said: 'There is no weight in this objection; the bill having got into the hands of the payee it is *prima facie* evidence that he has paid the amount of it to those who had a right to call upon him, although it is not indorsed to him by O'Neil or Chancellor.' In this suit, therefore, O'Neil has no interest; nor can it be said that his evidence has a tendency to discredit the bill."

In the case of *Mottram v. Mills*, (1 Sandford, 37) it was held, upon full examination of the authorities that a plaintiff's full indorsement of a bill to a subsequent indorsee remaining thereon uncanceled at the trial was no objection to his recovery on it against a prior party, if he produced the bill as holder, and that no transfer or receipt from the subsequent indorsee need be proved to entitle him to recover.

From these decisions, it is apparent the plaintiff in this case was not required to go farther in the proof of his ownership of the note than to produce it at the trial. This he did, and consequently established his ownership and right to sue upon it. Any further evidence on that point was therefore unnecessary. The plaintiff's case being made out without his own testimony of the reindorsement

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to himself, the evidence was simply cumulative, and its admission could in no wise prejudice the defendant—hence, he has no ground of complaint in this respect; no error except such as may have prejudiced the appellant's case being available on appeal.

But if it were rendered necessary for the plaintiff to produce proof in support of his title, his pleading was undoubtedly sufficient to admit of it. The material and issuable fact is the ownership; the indorsement is simply one means by which it may be proven, when it is necessary to do so. In this case, the plaintiff's pleading contains the allegation that he is the owner and holder of the note. Under that averment any proof tending to establish the ownership was admissible, whether it were orally or by indorsements on the instrument. It also follows from the rule laid down in the foregoing authorities, that it is unnecessary in a case of this kind for the holder to plead the reindorsement to himself; because, if it be unnecessary to prove it, it is equally unnecessary to allege the fact in the pleading—no fact ever being required to be pleaded which is unnecessary to be proven.

The second error assigned is, that the notes in suit were barred by the Statute of Limitations, and, therefore, that the Court below erred in not so holding; that being one of the defenses relied on in the answer. The facts upon which this assignment is based are these: At the time the notes matured the defendant was not within this State, but shortly after came here at several different times, remaining a few days each time, and again returning to California where he resided. These visits were known to the plaintiff, and it is found as a fact that the aggregate of the time thus spent in the State by the defendant, after the cause of action accrued against him, was not over a month, but that more than four years had elapsed between such visits and the bringing of this action. Upon these facts it is claimed by counsel for defendant that the statute began to run when the defendant first openly visited this State, and continued to run notwithstanding he again immediately returned to California, and has ever since remained there. But we are clearly of opinion that the law admits of no such construction. To make it a bar, the defendant must have been within the State for the full time limited by the statute after the cause of action accrued against him.

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That the statute when once it began to run would continue to run until it constituted a bar, and hence, if it were put in motion by the return to the State of the person against whom a cause of action existed, it would continue to run notwithstanding he might again immediately depart and remain away during the entire period prescribed by the statute, was perhaps the old rule; but section twenty-one of the Statute of Limitations of this State, as amended in 1867, declaring: "If when the cause of action shall accrue against a person he be out of the State, the action may be commenced within the time herein limited after his return to the State; and if after the cause of action shall have accrued he depart the State, the time of his absence shall not be part of the time prescribed for the commencement of the action," has entirely overthrown any such rule, and now the time which the person against whom a cause of action has accrued is out of the State constitutes no part of the time prescribed by the statute within which an action must be commenced. It is true, that if the defendant be absent from the State when the cause of action accrues, his subsequent return puts the statute in motion; but if he departs again before the statute becomes a bar, such departure and absence suspends its running until he again returns to the State. It was formerly held in New York, upon a statute similar to ours, that the second clause of this section had no application to the cases covered by the first clause; that is, if the person were out of the State at the time a cause of action accrued against him, his return put the statute in motion, and that the provision of the latter clause would not apply to any subsequent departure from the State. Such a construction is manifestly opposed to the purpose sought to be effected by the Legislature, and not warranted by the language of the section. We see no reason why the second clause does not as clearly include a person who was out of the State when the cause of action accrued, but subsequently returned and again leaves before the statute becomes a bar, as a person who was within the State at the time the cause of action arose and then departed. A person leaving the State after a cause of action has accrued against him, although he may have been out of the State at the time it arose, certainly comes within the meaning of the language of the

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second clause, for he departs the State after the cause of action accrued against him. And so the time of his absence from the State should not be computed in the time limited by the statute for bringing the action. This construction is also in harmony with what is now generally conceded to be the object sought to be accomplished by the adoption of this and similar sections; *i. e.*, to suspend the running of the statute when the person against whom the right of action exists is not within the jurisdiction of the State where it is to be brought. So it is also fully sustained by the later decisions in New York, the earlier cases adopting a different interpretation being repudiated as incorrect. (See *Cole v. Jessup*, 10 New York, 96; *Burroughs v. Bloomer*, 5 Denio, 532; *Ford v. Babcock*, 2 Sandford, 518.)

This being our view of this section of the Act of Limitations, it follows that the statute had not run in this case when the action was instituted, for it is found that the defendant was within the State only for the period of a month after the maturity of the notes.

The judgment of the Court below was correct, and must be affirmed. It is so ordered.

JOHNSON, J., did not participate in the foregoing decision.

JAMES D. MEAGHER, RESPONDENT, v. THE COUNTY OF STOREY, APPELLANT.

POWERS OF COMMITTING MAGISTRATES JUDICIAL. The power sought to be conferred upon City and Town Recorders, by section thirty-eight of the Act concerning Courts of Justice, (Stats. 1864-5, 116) to "exercise the duties of Committing Magistrates," etc., is completely judicial in its character.

CONSTITUTIONAL JURISDICTION OF MUNICIPAL COURTS. Section nine, article six, of the Constitution, as to the power which may be conferred upon Municipal Courts is restricted by section one of the same article, by which the jurisdiction of such Courts cannot be extended beyond municipal purposes.

"MUNICIPAL PURPOSES," WHAT. The words "municipal purposes only," as used in section one, article six, of the Constitution, restrict the jurisdiction to be exercised by Municipal Courts to such matters as relate to the affairs of the incorporated cities or towns where alone they are authorized to be established.

5	244
20	428
22*	1054

5	244
21	57
24*	370

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CITY RECORDERS CANNOT BE MADE COMMITTING MAGISTRATES. Section thirty-eight of the Act concerning Courts of Justice, (Stats. 1864-5, 116) in so far as it authorizes City and Town Recorders "to possess the powers and exercise the duties of Committing Magistrates," etc., is unconstitutional and void.

OFFICIAL SERVICES UNDER UNCONSTITUTIONAL STATUTES. Where an officer performed services under an unconstitutional Act: *Held*, that such services were gratuitous and no compensation could be recovered therefor, on the principle that the right to the salary or compensation of an office depends upon the title to such office.

INDIRECT TRIAL OF RIGHT TO OFFICE. In an action by a City Recorder for fees for services performed under an Act claimed to be void: *Held*, that the constitutionality of the Act could be inquired into, though it might be indirectly trying plaintiff's right to the office.

CONSTITUTIONALITY OF STATUTES INVOKED ALWAYS ISSUABLE. The constitutionality of a statute, under which any right is claimed in action, may always be inquired into.

VALIDITY OF ACTS OF DE FACTO OFFICERS. Acts performed by a City Recorder as a Committing Magistrate, though the statute authorizing him to so act is unconstitutional and void, are to be regarded as acts of a *de facto* officer, and valid as to third persons and the public.

DE FACTO OFFICERS CANNOT RECOVER FOR SERVICES. The considerations which support and validate the acts of officers *de facto* do not go so far as to authorize the recovery by them of payment for services performed as such.

APPEAL from the District Court of the First Judicial District, Storey County.

The services of plaintiff, for which this suit was brought, were performed between October 20th, 1866, and May 15th, 1867, inclusive. There was judgment for the plaintiff in the Court below, which at the time was presided over by the Judge of the Third Judicial District.

E. W. Hillyer, for Appellant.

I. The Act of the Legislature, conferring on City Recorders the power to examine and commit, in cases beyond their jurisdiction to try, is unconstitutional. Section nine of article six of the Constitution gives the Legislature the power to fix the jurisdiction of any Municipal Court that may be established in pursuance of section one; but the latter section is unequivocal that Municipal Courts can be established only for municipal purposes. In putting a con-

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struction on the two sections, every part of the Constitution should be regarded, and it should be so interpreted as to give effect to every part.

It is taken for granted that the word "municipal," in section one, is used in its restricted sense, as relating to cities, and not in that broad sense by which it may be made to include all State laws, as contradistinguished from international law.

Municipal purposes are those purposes for which the city government of a city is organized—purposes which relate to the community organized into a city, as distinguished from those which relate to the whole State.

Would it be contended that the Legislature could confer on City Recorders jurisdiction concurrent with Justices of the Peace, in civil cases? Yet, unless the jurisdiction of Recorders is confined to purposes strictly and *only* municipal—to the trial of those causes which are peculiar to a city—this might be done as properly as to give them jurisdiction over criminal cases arising under the laws of the State not peculiarly municipal, but affecting the community of the whole State.

II. But should this power to examine and commit be determined to have been properly conferred, still in no event can the City Recorder of Virginia charge or recover from the County of Storey any fees for services as Committing Magistrate. (Const., Art. XVII, Sec. 21; Stats. 1864–5, 116, Sec. 37; 217, Sec. 36; 218, Sec. 40.)

The power to examine and commit is either a municipal purpose, or it is not; if it be, the plaintiff under the law cited can receive no fees for its exercise; if it is not, then the Legislature could not confer it upon him.

Mitchell & Stone, for Respondent.

I. Without discussing the constitutionality of the statute, under which plaintiff claims to recover, we submit that its constitutionality cannot arise in this case for the following reasons:

1st, the question cannot be raised collaterally; 2d, the duties performed and services rendered were done and performed by him as an officer *de facto*, (conceding the law unconstitutional) and

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therefore valid; 3d, the acts done being valid, plaintiff is entitled to recover from defendant; and it having received the benefit of the services, cannot now plead or raise the question of constitutional authority.

In the discharge of his duties as a Committing Magistrate, plaintiff acted as such, under color of authority by express legislative enactment, and his acts were valid as a Committing Magistrate *de facto*. The acts of *de facto* officers are valid. (*People v. Sassovich*, 29 Cal. 485; *Mallett v. Uncle Sam Co.*, 1 Nev. 188.)

Again: In this case appellant contends that plaintiff had no right to exercise the functions of a Committing Magistrate, because the act is unconstitutional—thereby attempting in a collateral manner to determine the title to that office during the period alleged in the complaint. Respondent insists that the services having been performed under authority expressly given by the Legislature, and the county having received the benefit of those services, he is entitled to recover, and that the judgment of the Court below should be affirmed. (*People v. Morris*, 3 Denio, 382; *Tucker v. Mayor, etc., of Virginia City*, 4 Nev. 20.)

II. Appellant next says, that in no event can the Recorder of Virginia charge or recover from the County of Storey any fees for services as Committing Magistrate. It is true that the city charter limits the salary of the Recorder to a certain sum—that is, for his services as Recorder: but if the Legislature imposed jurisdiction of cases of violations and infringements of the State laws, it is clearly beyond the power of the Board of Aldermen to say he shall not receive compensation for such services.

E. W. Hillyer, for Appellant, in reply.

The rule that the acts of an officer *de facto*, when they concern the public or a third person, are valid, and that his right to perform those acts cannot be inquired into in a collateral proceeding to which he is not a party, cannot be invoked in this case, because the respondent is a party to this suit, and in his complaint has tendered a direct issue upon his right to act as Committing Magistrate and to receive pay from Storey County therefor. To say that the

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defendant cannot question the truth of this allegation is to deny it the right of defense. (*People ex rel. Morton v. Tieman*, 8 Abbott's P. R. 359.)

Again: Respondent seeks to avoid the statutes prohibiting the City Recorder from receiving these fees, by claiming that the services were performed not as Recorder but as Committing Magistrate. This position is untenable: the power to examine and commit is conferred generally on all City Recorders. Does the increase of jurisdiction create a new office?

By the Court, LEWIS, C. J.:

Plaintiff, who was the only qualified and acting Recorder for the City of Virginia, performed certain duties as a Committing Magistrate, imposed upon him by an Act of the Legislature, entitled "An Act concerning the Courts of Justice of this State and Judicial Officers," (Stats. 1864-5, 116) and now brings this action to recover the sum of five hundred and eighty dollars, claimed to be due for the services so imposed upon and performed by him. The law imposing these duties fixes no compensation for their performance, but the same fees are claimed by plaintiff that are allowed to Committing Magistrates for the like services.

Whilst not disputing the correctness of the charges thus made, the defendant contends that the law authorizing the plaintiff to perform the services is unconstitutional and void, and consequently that no compensation can be received.

The law in question, after conferring jurisdiction upon Recorders to hear and determine certain cases, declares in section thirty-eight, that: "The Recorder shall possess the powers and exercise the duties of Committing Magistrate in the criminal cases in which the Courts held by them have no jurisdiction, by this Act; and as such Magistrates, they may examine, commit, or discharge all persons brought before them, as the justice and law of the case may require." The services for which judgment is here sought were performed under this section. There can be no question that the power thus conferred upon the Recorder is as much and completely judicial in its character as the full hearing and determination of any cause of

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action possibly could be. Nor is this proposition denied or questioned by counsel for respondent. We may therefore proceed at once to the inquiry whether the Legislature possessed the authority to confer upon Recorders the right to perform these duties; or rather, to clothe them with the general judicial functions of Committing Magistrates. The Constitution (Art. VI, Sec. 1) confides all the judicial power of the State to "a Supreme Court, District Courts, and Justices of the Peace." And the same section provides further that: "The Legislature may also establish Courts for *municipal purposes only*, in incorporated cities and towns;" and section nine of the same article declares that: "Provision shall be made by law prescribing the powers, duties, and responsibilities of any Municipal Court that may be established in pursuance of section one of this article; and also fixing by law the jurisdiction of said Courts so as not to conflict with that of the several Courts of Record." The provisions of the last section are undoubtedly restricted by those of section one, and both being considered together, as they must be, it is evident that the last section only authorizes the Legislature to regulate the jurisdiction of Recorders within the limits prescribed in section one, without empowering it to extend such jurisdiction beyond the scope of municipal purposes.

These are the only sections of the Constitution bearing upon this question, and it will be observed that whilst the Legislature is authorized by the first section to establish Courts other than those established by the Constitution itself, still the jurisdiction to be conferred upon them is emphatically limited to municipal affairs. "For municipal purposes only" clearly restricts the jurisdiction to be exercised by them, when created, to such matters as relate to the affairs of the incorporated cities or towns where alone they are authorized to be established.

Municipal purposes as here used can have no other signification. But section thirty-eight of the law referred to unmistakably gives to the several Recorders of the State all the authority of a Committing Magistrate; the jurisdiction and right to examine and hold to answer all offenders upon charges for the violation of the general criminal laws of the State—a jurisdiction entirely beyond that which the Constitution authorizes the Legislature to confer upon them.

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To examine and commit for offenses committed against the criminal laws of the State ; that is, to discharge the general functions of a Committing Magistrate—cannot possibly be held to be the exercise of jurisdiction for municipal purposes. So the law imposing upon or authorizing the plaintiff to perform such duties is in conflict with the constitutional restraint imposed by section one above referred to.

Such being the case, it follows that he can derive no advantage from such law, for an unconstitutional law is no law at all. It is, so far as he is concerned, as if it had never been adopted by the Legislature.

The plaintiff then had no legal authority to perform the services for which this action is brought, and without it, his services must be held to be simply gratuitous, for which no compensation can be recovered ; for the right to the salary or compensation of an office depends upon the title to such office, and cannot be recovered by one who is simply an officer *de facto*. (*Stratton v. Oulton*, 28 Cal. 44.)

That the constitutionality of the Act under which the services were performed cannot be inquired into in a proceeding of this kind, because indirectly trying the plaintiff's right to the office held by him, is a proposition utterly untenable. He is a party to this proceeding, claiming the right to recover fees for services rendered under a certain law, which he invokes as the authority under which they were performed. If there were no such law, unquestionably the defendant could rely upon that fact as a defense. Such is virtually the defense now relied on ; for although it is admitted the Legislature passed an Act authorizing the performance of the services, still it is shown that such Act is null and void, which is tantamount to the entire absence of law or action on the part of the Legislature. A law which is in conflict with the fundamental law of the State is no law, and therefore that it is so in conflict is as available in defense as that no law whatever had been adopted. The nullity of the law is a complete defense to the recovery of the fees, and the only manner in which it can be interposed is that assumed in this case. To hold that the constitutionality of the Act cannot be inquired into would be to deny the right of defense to

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the action. The constitutionality of an Act under which any right is claimed in an action may always be inquired into, and we see no good reason why it should not be done in this case, when the unconstitutionality of the law is a perfect defense to the plaintiff's right of recovery.

Counsel is doubtless correct in the position that the plaintiff is an officer *de facto*, and that as such his acts are valid. They are valid, however, only as to third persons and the public. This is a rule founded upon considerations of public interest. (*Mallett v. Uncle Sam S. M. Co.*, 1 Nev. 188.) But the public interest does not require that the officer acting without authority should reap benefit from his position. The considerations which support and validate the acts of an officer *de facto* do not go so far as to require the payment of fees to such officer for services so performed. No Court has ever gone farther in this direction than to hold that acts performed by public officers are valid as to the public; they have not held that they themselves may in a direct proceeding of this kind recover any benefits from them.

The People v. Morris, (3 Denio, 382) referred to is not a parallel case, for the Legislature made provision for the payment of Lynch after the unauthorized services were performed, which, the Court held, it had the right to do. Hence, the question of the legality or illegality of Lynch's services could not regularly be raised in that case. His payment was provided for, notwithstanding the services were unauthorized when performed. Such is not the case here. The plaintiff is suing to recover the services rendered under a void law, with no subsequent Act of the Legislature authorizing his payment for services so rendered; and thus he is left with nothing but an unconstitutional law upon which to rest his claim for the money sought to be recovered.

The judgment, which was in his favor, must be reversed; and it is so ordered.

WHITMAN, J., did not participate in the foregoing decision.

The Imperial Silver Mining Company v. Barstow.

**THE IMPERIAL SILVER MINING COMPANY *et al.*, RE-
SPONDENT, v. CUTLER B. BARSTOW, APPELLANT.**

NO APPEAL ON FINDINGS EXCEPT BY STATEMENT. Findings are no portion of the judgment roll, nor is there any statutory provision for their introduction into the transcript on appeal under a Clerk's certificate; they must therefore be brought up, if at all, by means of a statement; and if not so brought up they cannot be considered.

RICHARDS v. HOWARD, (2 Nev. 128) **AND CORBETT v. JOB *et al.***, (*ante*, 201) on the point that findings will not be considered on appeal unless embodied in a statement, approved.

ADHERENCE TO LAW ON POINTS OF PRACTICE. Though a source of regret to a Court to decide a point of practice so as to affect substantial rights, such point when presented must be met, and the only safe and proper rule is to adhere to the law.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action of ejectment by the Imperial Silver Mining Company and the Empire Mill and Mining Company, to recover possession of Lot 10, Block 1, Range O, in the town of Gold Hill, Storey County. The findings and judgment were for plaintiffs. There was a motion by defendant for judgment on the findings, which was denied; and the appeal purports to be from the order as well as from the judgment.

Henry K. Mitchell, for Respondents.

I. The Court can only review on this appeal the judgment roll, for the reason that no motion for new trial was made; nor any statement on motion for new trial; nor any statement on appeal; nor any bill of exceptions.

The findings constitute no part of the judgment roll, and therefore cannot be considered by the Appellate Court. (*Corbett v. Job et al.*, *ante*, 201; 27 Cal. 408; 30 Cal. 280.)

Mesick & Seely, for Appellant.

No statement was necessary for an authentication of the find-

5	232
7	180
13	80
13	242
16	40
18	348
4*	498
5	252
21	451
23*	600
5	252
23	117
22	118
5	252
24	400

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ings. When signed and filed they became part of the record. The only object of a statement is to make that record which was not so. It never has been considered necessary to embody matter of record in a bill of exceptions. (*Johnson v. Sepulveda*, 5 Cal. 150.) And in *Reynolds v. Harris*, (8 Cal. 617) it was held under a statute precisely like that which controlled our practice in this case, that the findings by being signed by the Judge and filed with the Clerk become matter of record without any statement, and just as much so as any statement could by being signed by the Judge and filed with the Clerk, and that a copy of the findings so signed and filed was as sufficiently and well authenticated before the Court on appeal by the certificate of the Clerk as a statement could be.

The decisions of the Courts of California, upon the proper construction of their Practice Act which we adopted bodily, are peculiarly entitled to recognition in this Court. Until the recent decision of this Court in *Corbett v. Job*, the profession believed, and had a right to believe, that the correct practice was indicated in *Reynolds v. Harris*. It is but fair to conclude that when the law of California upon this subject was adopted here it was with the understanding of its meaning as declared in the California Courts. A departure from the rule so laid down must operate as a grievous surprise to litigants and lawyers.

By the Court, WHITMAN, J. :

In this case objection is made by respondents to the consideration by this Court of the findings of fact and conclusions of law of the District Court. Unless they can be considered, nothing remains save the judgment roll and order made subsequent to judgment. It becomes then vital to decide whether the findings are presented in such manner that they can be noticed.

It was decided in *Corbett v. Job et al.*, (*ante*, 201) upon this precise point that findings similarly brought up had no proper place in the transcript. This opinion was based upon the statute and the case of *Richards et al. v. Howard*, (2 Nev. 128) and was not pronounced without reference to the case of *Reynolds v. Harris*, (8 Cal. 617).

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While the general proposition as stated by appellant's counsel, as to the construction of statutes adopted in the light of previous judicial interpretation, is fully admitted; and while it is also the fact that the statute of California at the date of *Reynolds v. Harris* was like that governing the present case; still the rule invoked is not applicable, mainly because in that case no attempt is made to construe the statute, but its force and meaning being substantially admitted, a step outside is taken, and the opinion is wholly based upon the premise that whatever is matter of record in a lower Court, is therefore matter for review in an appellate tribunal.

This does not follow. Many things may be so matter of record, and yet entirely unnecessary or improper under the circumstances of a given case, for the purpose of review; and however necessary or proper, can be reviewed only as prescribed by the Legislature; so that no vested or constitutional right of litigants is thereby impaired.

The statute has plainly and explicitly declared what an appellant shall furnish this Court to entitle him to a hearing; such must be before the Court. An appellant is by no means precluded from bringing up other matter; but the mode of so doing is properly subject to statutory regulation. Whatever does not come up in the judgment roll, or under Clerk's certificate as by statute provided, must come embodied in a statement.

Findings are no portion of the judgment roll. There is no provision for their introduction into the transcript, which is the record for the consideration of this Court, under special certificate; therefore they must appear, if at all, by means of a statement. The case of *Reynolds v. Harris* is not construction, but legislation. In 1862 a statute was passed in California making findings part of the judgment roll; perhaps it would be well were there a similar statute in this State, but none such exists.

While it must always be a source of regret to a Court to decide a point of practice in such manner as perchance to affect substantial rights; and while this Court will not on its own motion search such questions, still when presented they must be met; and in cases devoid of ambiguity and presenting no room for judicial interpretation, like the present, the only safe and proper rule which any

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Court can follow, is to adhere to the statute. Such course, though productive of present inconvenience, must result in ultimate good. There being then no findings for review, this case must be decided upon the judgment roll and order referred to. In these no error appears, wherefore they must be affirmed. It is so ordered.

ROBERT B. ELLIS, APPELLANT, v. THE CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA, RESPONDENT.

RANKIN v. NEW ENGLAND AND NEVADA Co., (4 Nev. 78) AND YELLOW JACKET SILVER MINING Co. v. STEVENSON, (*ante*, 224) as to the rule touching the liabilities of corporations upon contracts, approved.

STATEMENT FOR NEW TRIAL—SPECIFICATION OF ERROR. In a statement on motion for new trial, which contains the charge of the Judge as an entirety, a specification of error, "that the Court erred in giving to the jury the instructions as set forth in this statement," is sufficient.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The plaintiff sued as a physician and surgeon for four hundred and seventy dollars, for professional services rendered to defendant, in attending on R. G. Cheshire and F. H. Pedrick, who had been wounded by a collision on the railroad near the town of Verdi, on September 11th, 1868. He recovered judgment, and the defendant then made a motion for new trial, which was granted.

The nature of the objectionable charge referred to in the opinion is thus stated in the opinion of Judge Harris, of the Court below, in granting the new trial: "The Court seems, to some extent, to have based the plaintiff's right to recover upon the proposition in substance, that the jury were first to find from the evidence whether the plaintiff, in good faith, charged the value of his professional services against the defendant; and if so, that the jury were then to determine whether from the acts, requests, or statements of the agents of the defendant, a reasonable and prudent person would

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deem himself authorized by the defendant to render professional services at its charge; and whether, under the disclosures of the evidence, the acts, requests, and statements of the agents, were of such nature only as to the mind of a reasonable and prudent person, in the position of the plaintiff, would appear entirely consistent with personal charity upon their part, and in their nature placing him upon his guard and inquiry as to the liability of the defendant.

“Now, while it is conceived that, as a separate question of fact, the above propositions may properly enough have been submitted to the jury, still, in the absence of any explanatory instruction, it would seem that under the charge as given, the jury might readily have been induced to consider that the right of the plaintiff to recover could be properly made to hinge upon what would have been the course taken by a reasonable and prudent person in the plaintiff's position—and this, *regardless entirely* of the strict rules of the law of contracts. I hardly think that the question of contract or no contract can be safely left for determination to such a criterion—hence, I am of opinion that the charge embodies error in this particular.”

Thomas E. Haydon, for Appellant.

J. B. Marshall, for Respondent.

By the Court, WHITMAN, J.:

This appeal is from an order of the District Court of the Third Judicial District, granting respondent, defendant in the Court below, a new trial. The ground upon which the order is based, is error in the instructions given by the Court, on its own motion, to the jury.

The charge, set forth in the statement, is certainly at variance with the rule touching the liabilities of corporations upon contracts, as held by this Court, in *Rankin v. New England and Nevada Company*, (4 Nev. 78) and *The Yellow Jacket Silver Mining Company v. Stevenson*, (*ante*, 224). The views expressed in those opinions sufficiently elucidate the present case, and need not be here repeated.

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It is, however, objected that the specification of error in the statement on motion for a new trial was insufficient to warrant its consideration by the Court. It was held in *Corbett v. Job et al.*, (*ante*, 201) that the statute regulating statements on appeal must be complied with, or the statement must be disregarded: so, with motions for a new trial. The statute provides:

“When the notice designates, as the ground of the motion, error in law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely.” “If no such specifications be made, the statement shall be disregarded.”

The notice in this case, among other grounds, designates the following: “For error of law in giving instructions to the jury, which were objected to by defendant, and exceptions duly then and there taken.” The attempted specification is: “For that the Court erred in giving to the jury instructions as set out in this statement.” It would have been better to have used the word “charge,” instead of “instructions,” as the statement shows a continuous charge, without subdivisions—through which a thread of errors runs, as noticed by the District Judge, in his opinion, on granting the motion for a new trial.

Under such a state of facts, the specification was a compliance with the statute: as the charge presented in the statement is an entirety—a single instruction as it were—and as such erroneous. The specification, then, being sufficient, and no abuse of discretion appearing in granting a new trial upon the ground referred to, and for the reasons given by the District Judge, the order of the Court is affirmed, and the cause remanded.

It is so ordered.

Caldwell v. Greely.

J. C. CALDWELL, RESPONDENT, v. A. L. GREELY, APPELLANT.

STATEMENT ON NEW TRIAL — SPECIFICATION OF INSUFFICIENCY OF EVIDENCE. On motion for new trial on the ground of insufficiency of the evidence, it is indispensable in the statement to designate the particulars in which the insufficiency consists.

ERRORS OF LAW TO BE POINTED OUT IN STATEMENTS. A statement on motion for new trial on the ground of errors in law must particularly designate the errors relied on, otherwise it will be disregarded.

FATAL DEFECTS IN STATEMENTS ON NEW TRIAL. If a statement on motion for new trial, on the grounds of insufficiency of evidence and errors in law, fail to specify the particulars in which the evidence is insufficient, and the particular errors in law relied on, an order denying such motion will not be disturbed in the Appellate Court, nor will any inquiry be made into the merits of the motion.

RECORD ON APPEAL FROM ORDER GRANTING OR REFUSING NEW TRIAL. On appeal from an order granting or refusing a new trial, the Appellate Court is confined in its investigations to the record used in the motion in the Court below.

APPEAL FROM PROCEEDINGS SUBSEQUENT TO ARGUMENT ON MOTION FOR NEW TRIAL. Proceedings occurring after the argument on motion for new trial can be brought to the attention of the Appellate Court only by means of a statement on appeal setting them out.

APPEAL FROM ORDER REFUSING AMENDMENT TO STATEMENT ON NEW TRIAL. Where, after argument on motion for new trial, a motion was made to amend the statement, which was refused, and the transcript on appeal contained no further statement than that used on the motion for new trial: *Held*, that the merits of the application to amend could not be inquired into by the Appellate Court.

AMENDMENTS SHOULD BE LIBERALLY ALLOWED. Courts should be liberal in allowing amendments to defective statements on motion for new trial, etc., and should themselves suggest them whenever a defect or deficiency is apparent.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action for an accounting and reconveyance of real estate. The plaintiff had leased of defendant certain mills known as the "Petaluma," "Daney," and "Bowers," and worked them. Afterwards, in July, 1867, becoming financially embarrassed, he assigned all his property, real and personal, to defendant, who took possession and proceeded to pay off the claims against plaintiff.

5	258
9	117
17	258
30*	75
17	258
30*	88
20	40
14*	58
5	258
21	235
29*	404
5	258
22	117
5	258
24	400

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Henry K. Mitchell, to whom the cause was referred, reported in favor of plaintiff for the reconveyance of real estate, and a money judgment of two hundred and eighty-one dollars and sixty-eight cents; and judgment was entered in accordance with the report. The statement on defendant's motion for new trial is described in the opinion.

Hillyer, Wood & Deal, for Appellant.

It was objected in the Court below that the statement on motion for new trial did not comply with the statute, in this, that it did not specify the particulars wherein the evidence was insufficient; and the Court below disregarded the statement and overruled the motion. The same objection is insisted on in this Court. We submit that we have specified all we are required by the statute to specify. It is true, we might have covered a large space with what might be called specifications; but such specifications would have amounted to no more than the specifications we did make. This Court, where it is asked to grant a new trial on the ground of insufficiency of evidence, is obliged, in coming to a decision, to review the whole testimony, even where it finds the most elaborate specifications. (See *Barrett v. Tewksbury*, 15 Cal. 358; *Muhlenberg v. Florence*, 5 Ohio, 247; *Atchison v. Sutcliff*, 18 Ohio, 124.)

No specification can be suggested in this case that would amount to anything more than that in the record.

Clayton & Davies, for Appellant.

I. What purports to be a statement on motion for new trial contains no specifications of the grounds upon which appellant intends to rely, and should therefore be disregarded. (Practice Act, Secs. 197 and 332; *Barrett v. Tewksbury*, 15 Cal. 356; *Reynolds v. Lawrence*, 15 Cal. 361; *Nixon v. B. R. & A. H. & M. Co.*, 24 Cal. 372; *Hutton v. Reed*, 25 Cal. 433; *Walls v. Preston*, 25 Cal. 61; *Willard v. Hathaway*, 27 Cal. 119; *Crowther v. Rowlandson*, 27 Cal. 376; *Love v. Sierra Nevada Co.*, 32 Cal.

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650; *Barton v. Newman*, 34 Cal. 90; *Corbett v. Job et als.*, ante, 201.)

II. The motion to amend the statement on motion for new trial was properly refused. It was made after the statement had been settled, and was properly refused because the Court had then lost jurisdiction, and could allow no addition to the statement. (*Lobdell v. Hall*, 3 Nev. 525.)

III. The proper practice is to raise the objection to want of specification on the argument as a reason why the motion for new trial should be denied. (*Quivey v. Gambert*, 32 Cal. 304.)

By the Court, LEWIS, C. J.:

This appeal is taken from an order denying a new trial, and also from the judgment. The statement on the motion assigned as the grounds upon which it was to be made:

1st. Insufficiency of the evidence to justify the findings and report of the Referee.

2d. Insufficiency of the evidence to justify the judgment; and that it is against law.

3d. "The Referee erred in admitting certain testimony, to the admission of which the defendant objected and excepted, as shown in the foregoing statement."

These are the only grounds set out; and the statement contains no more particular specifications of the errors upon which the moving party intended to rely, or designation wherein the evidence was insufficient. The law declares that when the notice of motion "designates as the ground upon which the motion will be made the insufficiency of the evidence to justify the verdict, or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient." And again: "When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely."

Does the statement in this case meet these requirements of the law, in respect to the specifications? Clearly not. Insufficiency of the evidence to justify the findings, or judgment, is simply the

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general ground upon which a new trial may be granted. The Practice Act requires something more: it makes it necessary to designate the particulars wherein the insufficiency consists. And this is held indispensable upon a like statute. (*Sanchez v. McMahon*, 35 Cal. 218; *Vilhac v. Biven*, 28 Cal. 409.) But it is argued for appellant that often, as is claimed to be the case here, no more particular specification can be made to illustrate the first two grounds. We can, however, conceive of no such case. Certain issues are always presented by the pleadings—consisting of facts averred by the plaintiff, and either denied, or confessed, and avoided by new matter in the answer; and the evidence is, or should be, directed to such issues. That the evidence is insufficient to justify the decision, or judgment, must therefore be the result either of an entire failure to produce proof in support of some one or all of the material facts constituting the cause of action, or defense; or if any be produced, that it was overcome by the testimony opposed to it. In either case, that fact may be stated. Thus, if the plaintiff failed to produce any proof whatever, in support of some facts material to his case, that may be stated, calling attention to the fact so unsupported by proof; or if instead of an entire absence of evidence in such case, it is claimed that the defendant's testimony outweighs that of the plaintiff, upon that particular issue, that fact could be mentioned; or if there is a failure of evidence upon all the issues; or if the evidence upon all is overcome by that opposed, that fact may likewise be stated. In this case, it would not have been very difficult to state that the Court, or Referee, in opposition to the evidence of the defendant, and without proof on the part of the plaintiff, or without sufficient proof on his part to overcome that of the defendant, rejected certain items of account, mentioning them. Or it might have been stated in general terms, that the evidence on behalf of the defendant established a demand against the plaintiff, amounting to a certain sum, but that the Court reduced such sum, without any evidence on behalf of the plaintiff to authorize it, or upon evidence insufficient to outweigh that of defendant. Nothing of the kind being attempted, the law was not complied with. So as to the third ground assigned. It is equally necessary to particularly specify the errors to be relied on. If the

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error complained of be the improper admission of testimony, attention should be called to the particular evidence so admitted. However, if it were conceded that the general statement here made, to wit: that evidence was erroneously admitted and excepted to by the defendant, were sufficient, it would be of no avail to appellant, for he has neither relied on any such error in this Court, nor have we been able, upon looking over the transcript, to find any. We conclude, then, that the statement did not conform to the requirements of the law in this respect; and consequently, that it should have been disregarded by the Court below, and the motion decided as if no statement whatever had been filed—section one hundred and ninety-seven of the Practice Act expressly declaring that a statement deficient in this particular shall be disregarded. If so disregarded and the new trial be denied, the order denying it cannot be disturbed in the Appellate Court. The failure to specify the errors is a good ground, and sufficient authorization for such action of the Court; and therefore, when upon an appeal from such order it appears that the statement upon which the motion was made is deficient in this particular, the order will be affirmed without any inquiry into the merits of the motion. (*Wing v. Owen*, 9 Cal. 247; *Hutton v. Reed et al.*, 25 Cal. 478; *Walls v. Preston*, 25 Cal. 59.) It follows that the order denying the appellant's motion cannot be disturbed.

Whether the Court erred in refusing to allow the defendant to amend his statement by supplying the specifications, cannot be determined upon this record. The offer to do so was not made until the lapse of several days after the argument of the motion; and as there is no statement on appeal in the case, the fact that such offer was made is not properly before this Court. On an appeal from an order granting or refusing a new trial, the Appellate Court is confined in its investigations to the record used on such motion in the Court below. Such record is made the statement on appeal from the order. (Prac. Act, Sec. 197; *Quivey v. Gambert*, 32 Cal. 806.) But whether this be so or not, it is certain that proceedings occurring after the argument of the motion for a new trial can be brought to the attention of this Court only by means of an authenticated statement setting them out. The minutes of the Court

 McWilliams v. Herschman.

made after the submission of the motion do not come to this Court without a statement on appeal. The only minutes authorized to be brought up without it are such as may have been referred to or read upon the argument of the motion. (See same section.) Nor on an appeal from the judgment do they come up, without a statement. The judgment roll alone comes to the Court upon such appeal. Neither the amendments offered to be made, the notice which was given of the intended application to make them, nor indeed any of the proceedings after the argument of the motion, are brought up in any authentic manner in this case.

The action of the Court below upon the application to amend cannot therefore be inquired into. We have no hesitation in saying, however, that the Courts should be liberal in allowing amendments of this kind, and should themselves suggest them whenever a defect or deficiency is apparent.

It is not claimed that any error is apparent in the judgment roll, and we have been unable to discover any.

The judgment, together with the order denying the new trial, must be affirmed.

**CHARLES McWILLIAMS, RESPONDENT, v. ADOLPH
HERSCHMAN, APPELLANT.**

5	268
6	26
11	381
16	71
20	46
14*	587

NEW TRIAL—SPECIFICATION OF "ERRORS IN LAW." Where a motion for new trial was made upon the sole ground of "errors in law occurring at the trial," and the statement contained no specification of the particular errors relied on: *Held*, that the granting of a new trial was error.

DEFECTIVE STATEMENTS ON NEW TRIAL. A statement on motion for new trial on the sole ground of errors in law, which contains no specification of particular errors, as required by section one hundred and ninety-seven of the Practice Act, is virtually no statement; and a Court has no more right to grant a new trial on such a statement than if there were no statement at all.

WAIVER OF ERRORS TO BE SHOWN BY PARTY CLAIMING WAIVER. It is incumbent upon a party who wishes to avoid the consequence of error in legal proceedings upon the ground of waiver by the opposite party, to show such waiver—not upon the party insisting on the error to establish that he did not waive it.

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POINTS INVOLVED ON APPEAL FROM NEW TRIAL ORDER. All points which could be urged in the Court below on a motion for a new trial either for or against it, including objections to the statement, may be raised on appeal from the order granting or refusing it without any further statement.

APPEAL from the District Court of the First Judicial District, Storey County.

The plaintiff alleged in his complaint that he had loaned defendant three thousand dollars, of which defendant had paid him three hundred dollars; and he demanded judgment for two thousand seven hundred dollars. Defendant in his answer set up that in playing a game of chance with plaintiff, he had borrowed of him some three hundred dollars to stake on the game; that he lost and paid; and that then they "played for stakes without the money up," at the same time denying any other borrowing.

Williams & Bixler for Appellant, claimed that a new trial could not be granted on the ground of errors in law, where the statement omitted to specify the errors relied on; and cited section one hundred and ninety-seven of the Practice Act and *Lobdell v. Hall*, (3 Nev. 522).

R. H. Taylor, for Respondent.

The objection, for want of specification of errors in statement on motion for new trial, is not tenable, because no such objection was taken in the Court below. (*Howard v. Harmon*, 5 Cal. 78; *Stoddard v. Treadwell*, 29 Cal. 281; *Quivey v. Gambert*, 32 Cal. 304.)

[The respective counsel cited many cases *pro* and *con* on the subject of gaming contracts and money loaned for the purposes of gaming; but as the Court did not pass upon the subject, they are omitted.]

By the Court, LEWIS, C. J.:

The trial in this case resulted in a verdict in favor of the defendant, whereupon the plaintiff gave notice of motion for new trial

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to be made upon the sole ground of errors in law occurring at the trial. A statement to be used on such motion was prepared and filed within the proper time, but the only assignment of error was as stated in the notice, "error in law occurring at the trial," unaccompanied by any particular specifications as required by the Practice Act. Upon this statement, the Court below granted a new trial. From the order so made the defendant appeals, contending: First, that the statement should have been disregarded, and consequently the new trial refused, as there was nothing before the Court upon which it could be granted. This proposition is based upon that provision of section one hundred and ninety-seven of the Practice Act which declares that when the notice of motion for new trial designates, as the ground upon which the motion will be made, errors in law occurring at the trial and excepted to by the moving party, "the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded."

There was not in this case an attempt even to specify the errors upon which the moving party intended to rely, and still it appears that the statement was acted upon in the Court below, and that the new trial was granted upon it. By the clear and unmistakable language of the section referred to, it was the duty of the Court below to disregard the statement thus deficient; and as there was no pretense of any grounds for new trial except such as were presented in the statement, the order granting it was unauthorized and erroneous. To avoid this consequence, however, it is argued by the respondent that as no objection to a consideration of the statement was made in the Court below, the appellant must be deemed to have waived it, and therefore it cannot be raised in this Court.

But in answer to this it may be said, it does not appear from the record here whether any such objection was interposed in the Court below or not. Nor indeed could it be brought to the attention of this Court upon an appeal of this kind. The section already referred to further declares that "The affidavits and counter-affidavits, or the statement thus used in connection with such pleadings, depositions, documentary evidence on file, testimony taken by a reporter, and minutes of the Court, as are read or referred to on the

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hearing, shall constitute, without further statement, the papers to be used on appeal from the order granting or refusing the new trial."

Upon an appeal, then, from such order, any objection or motion which might be made by the opposing party respecting the record could not be brought to this Court. This informality or defect in the statement was undoubtedly a good ground for denying the motion. Had the Court discovered it before the order was made it could have placed its denial upon the sole ground that there was no such statement before it as could legally be considered. The only ground then upon which it could be claimed that this objection cannot be raised in this Court, is, that it was waived by the appellant in the Court below. There is, however, nothing in the record before us to warrant the conclusion that it was waived. For aught that appears here, the objection was made at the proper time. It will not be claimed that it is incumbent on the appellant here to show that he did not waive the objection. It is always the duty of the person wishing to avoid the consequence of error in legal proceedings, upon the ground of waiver by the opposite party, to show such waiver, and not upon the person insisting on it to establish the negative.

The record presented to us clearly shows that the statement on motion for new trial should have been disregarded by the Court below, and that instead of so doing it granted a new trial upon the showing made by it. It is thus made to appear that the Court erred in making the order. If the appellant in any way waived his right to insist upon such error, it is the duty of the respondent to show such waiver; otherwise, it is available here as in the Court below. Let it be supposed that in a case where the errors relied on were such as would only be presented by a statement, and no statement were filed, but still a new trial is granted: surely, nothing further would be necessary for the party opposing such motion than to make the showing to this Court that the order was made without a statement. It would not be necessary for him to show further that he objected to the hearing of the motion, or in any way excepted to the action of the Court. So here the statement, until the errors to be relied on are properly specified, is virtually no

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statement, for the law makes it the duty of the Courts to disregard it. Hence, when it is shown that instead of granting the new trial without any statement whatever, it was granted on one which the law declares shall be disregarded, what more is necessary to be done by the appellant? The Court has no more right to grant a new trial upon a statement defective as this is, than it has when there is no statement at all. The party opposing the motion could as well waive an entire statement as any essential part of it; and, as it would not be necessary for him to show that he did not waive the statement, where none was made out, so it is likewise unnecessary for him to show that he did not waive a material defect in a statement which may be filed or used. Proof, or a showing of waiver, as has already been seen, would have to come from the other side.

Again: We know of no way by which an objection to the statement, or a motion to strike it out, could be brought to the attention of this Court, except by a separate statement on appeal; and it is very doubtful whether it could be brought here even in that way. But admitting it can, we think it quite clear such a course was never intended to be required by the Legislature. The purpose evidently was to allow all points which could be urged in the Court below, either for or against the motion for new trial, to be raised on the appeal from the order granting or refusing it, without any further statement; otherwise, why are the statement and papers used on such motion made the record upon which the order is to be reviewed in the Appellate Court? And why, as appears to be the case, is this Court confined to an investigation of the statement and papers used on such motion. It is certain that no objection to the statement or motion to strike it out would come to this Court under the provisions of section one hundred and ninety-seven of the Act already quoted, upon a mere appeal from the order. As a consequence, it either could not be brought here at all, or it must be presented in a separate statement, setting forth the fact that such objection or motion was made — a practice which seems to be entirely unauthorized, and evidently not contemplated by the Legislature. And if not authorized, then the appellant would be entirely deprived of any advantage from such objection or motion, even if it

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were made, because he would be entirely unable to present it to the Court.

These considerations have conducted us to the conclusion that it was the duty of the Court below to disregard the statement, and refuse a new trial. The order granting it was therefore erroneous, and must be set aside.

It is so ordered.

KATE HEALEY, RESPONDENT, v. IMPERIAL FIRE INSURANCE COMPANY, APPELLANT.

INSURANCE—NOTICE OF OTHER INSURANCE. Where a policy of insurance contained a provision for "notice of any other insurance already made or which shall afterwards be made elsewhere," otherwise the policy to be void; and the property was afterwards insured in another company without proper notice: *Held*, that the policy was vitiated.

INSURANCE CASES—BURDEN OF PROOF. A policy of insurance is a contract which must be enforced according to its terms; and the burden of proof is upon the claimant thereunder to show a compliance therewith.

PLEADING ON INSURANCE POLICY. If, in an action on an insurance policy, the claimant alleges generally a compliance with its terms and verifies his pleading, he will not be put to proof unless in the answer particular breach is averred.

NOTICE OF INTENTION TO INSURE NOT NOTICE OF INSURANCE. Where an insurance policy provided for notice of any other insurance which should afterwards be made: *Held*, that notice of intention to further insure was not notice of further insurance, nor equivalent thereto.

INSURANCE AGENT—EXTENT OF AUTHORITY. An insurance agent having authority to receive application, make survey, remit to general agent, receive policy, and collect premium, though the agent of the insurer for all purposes touching the insurance up to the time of closing the application, has no power after the policy arrives in his hands to waive any of its conditions; all his functions as agent have then ceased, except to receive the premium.

CONSTRUCTION OF INSURANCE POLICIES. In the construction of policies of insurance there is but one safe rule, and that is, to take the contract as written, subtracting nothing therefrom and adding nothing thereto: there is no substantial compliance with its terms, except an exact compliance.

NOTICE OF INTENTION TO RENEW INSURANCE NOT NOTICE OF RENEWAL. If an insurance policy require "notice of any other insurance already made, or which shall afterwards be made elsewhere," a notice of an existing insurance and of an intention to renew it, is not notice of the fact of renewal, nor a compliance with the policy.

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APPEAL from the District Court of the First Judicial District, Storey County.

The policy of fire insurance, upon which this action was brought, was upon a frame dwelling house on North F Street, Virginia City, for one thousand five hundred dollars, and upon furniture therein for three thousand dollars. Nearly all the property, alleged to have been worth ten thousand dollars, was destroyed by fire on January 3d, 1869; and this suit was instituted April 1st, 1869. The jury returned a verdict in favor of plaintiff for four thousand five hundred dollars. Defendant's motion for a new trial was overruled.

Williams & Bixler, for Appellant.

I. Notice of intention to procure further insurance, or of expectation of obtaining further insurance, is not a compliance with the stipulation in the policy, and is wholly immaterial. (*Forbes v. Agawam Mutual Fire Ins. Co.*, 9 Cush. 473; *Kimball v. Howard Fire Ins. Co.*, 8 Gray, 37.)

II. The authority of the agent was merely to solicit insurance, make surveys, and receive applications; and though the fact of a prior insurance "already made" might properly be communicated to him when negotiating the contract as a fact entering into the negotiation, yet after the contract was made and the policy issued his functions ceased, and he had no power to deal with the assured in respect thereto. (*Wilson v. Genessee Mutual Ins. Co.*, 14 N. Y. 421; *Mitchell v. Lycoming Mutual Ins. Co.*, 51 Penn. State, 410; *Gilbert v. Phoenix Ins. Co.*, 36 Barb. 375; *Hall v. Mechanics Ins. Co.*, 6 Gray, 173.)

III. The failure to give notice of the fact of the subsequent insurance avoids the policy. (*Gilbert v. Phoenix Ins. Co.*, 36 Barb. 377; *Carpenter v. Providence Ins. Co.*, 16 Peters, 495.)

Henry K. Mitchell, for Respondent.

I. The policy was not void by reason of the stipulation, because at the time of application there was an existing insurance, of which

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defendant had notice ; it also had notice of application already made to renew the insurance then existing ; it was not notice of intention to procure other insurance, but notice of the existence of other insurance, and that the application had been made to renew such existing policy, to take effect when the policy to be renewed should expire. Such renewal is not within a provision requiring notice in case of making other insurances. (*Brown v. Cattaragus County Mutual Ins. Co.*, 18 New York, 385 ; *Baptist Society v. Hillsborough Mutual Fire Ins. Co.*, 19 N. H. 580.)

II. The authorities cited by appellant are cases where the insured declared an intention to take out other insurance at some future time. Here there was notice that application had been made ; that is, had been favorably received by the agent, survey made, and sent to the home office ; and that plaintiff expected to receive the policy on the day following, or the day after ; she did, in fact, receive it on the second day. All this amounts not to a notice of intention to procure, but to a procuring.

III. Notice of either prior or subsequent insurance to an agent having authority to solicit insurance, receive applications, make surveys, and receive premiums, is valid. (*Sexton v. Montgomery County Mutual Ins. Co.*, 9 Barb. 191 ; *McEwen v. Montgomery County Mutual Ins. Co.*, 5 Hill, 101 ; *Schenck v. Mercer County Mutual Ins. Co.*, 4 Zabriskie, 447 ; *Warner v. Peoria Marine and Fire Ins. Co.*, 14 Wisconsin, 318.)

By the Court, WHITMAN, J. :

In this case respondent brought action to recover loss by fire of certain property insured by appellant, who defended upon several grounds, one only of which is now urged, and that is, the violation by respondent of stipulation number seven, referred to in, and made a part of, appellant's policy of insurance, as follows :

"That persons who have insured property with this company shall give notice of any other insurance already made, or which shall afterwards be made elsewhere on the same property, so that a memorandum of such other insurance may be indorsed on the policy or policies effected with this company ; otherwise, such policy or

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policies will be void. This insurance may be terminated by this company on returning a ratable proportion of the premium for the unexpired term."

Appellant claims that the evidence shows that respondent did in fact procure a subsequent insurance, and failed to give proper or any notice thereof, and that therefore she cannot recover in this action.

Respondent claims that the insurance other than that of appellant was in fact prior thereto, and existed at the time of application therefor, and that due notice was given to agent of appellant; that if not prior in point of actual date of present policy, yet that it was legally so, such being simply a renewal of a policy, being and notified, at the time of appellant's insurance.

The evidence is very brief and not really conflicting. Respondent testifies that she had applied to the agent of the Hamburg and Bremen Fire Insurance Company for insurance, and when the agent of appellant came to her house to deliver its policy, she told him before she paid him the premium, that "she was about to get another policy;" that she did in fact receive the Hamburg and Bremen policy two days thereafter; that such agent replied to her saying: "that was all right—that I could get insurance as much as I liked, or something to that effect." Respondent also stated that the application to the agent of the Hamburg and Bremen Company was for the renewal of an old policy held by her.

On the part of appellant, George W. Hopkins testified that he was its agent to receive application, make survey, remit to general agent at San Francisco, receive policy if granted, and collect premium; that as such agent he received the application of respondent, and on asking question if there was any other insurance on the property, was answered that there would be none on the eighteenth, meaning the eighteenth of June, 1868; and that therefore he indorsed upon the application "no other insurance," and directed the policy to take effect upon the eighteenth; that respondent in answer to a question as to the value of her property, said: "I am going to insure in another company;" to which witness said: "That's all right; I have nothing to do with it, if they take it after you get through with us;" that he did not recollect delivering the

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policy, nor any other conversation with respondent, save that at the time of application.

Appellant further proved by its general agents that they never received any notice of other insurance either prior or subsequent; and also exhibited respondent's policy from the Hamburg and Bremen Company as an original insurance, bearing date June 18th, 1868, and running from noon of that day for one year; and proved by its agents that no other had ever issued to respondent."

The evidence has been thus fully stated, that it may be considered with reference to the several legal points involved, without lengthy repetition. The jury found a verdict for respondent, and the District Court denied a new trial, from which order, and the judgment, this appeal is taken.

As has been said, there is no real discrepancy nor conflict in the evidence. The two conversations testified to by respondent and Hopkins may both have taken place; she may have held an assigned policy in the Hamburg and Bremen Company, and have considered the one in evidence only as a renewal thereof. In such view, and taking all of the testimony on the part of respondent at its fullest weight, the case will be considered.

It should be here remarked, that as the Hamburg and Bremen policy has been by both parties, so far as this case is concerned, treated as valid—and as no question has been made as to the effect thereupon—if it was not, that point will be passed with the simple suggestion that the weight of authority upon examination not entirely full, seems to be, that unless a second policy be void upon its face, it should be treated as valid, in reference to a question of breach of condition or stipulation by the insured claiming upon a first.

A policy of insurance is a contract, which must be enforced according to its terms; and the burden of proof is upon the claimant thereunder, to show as pleaded compliance therewith. The various stipulations and conditions constitute as a whole the basis upon which, in this particular instance and generally, the contract is raised; and those outside the body of the policy are made part thereof by due reference.

The claimant having alleged generally a compliance will not be put to proof under sworn pleadings, unless in the answer particular

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breach is averred. In this case such averment is confined to stipulation hereinbefore recited.

The evidence of the respondent upon the issue was really less favorable to her than that of appellant, and only proved that she had notified Hopkins of intention to further insure, to which he assented. Such notice of intention was no compliance with the terms of the stipulation, as will be presently shown; and his assent could not be held as a waiver on the part of his principal, for the main reason that at the time stated by respondent all his functions as agent had ceased, save to receive the premium. (*Wilson v. The Genessee Mut. Ins. Co.*, 14 N. Y. 418; *Mitchell et al. v. The Lycoming Mut. Ins. Co.*, 51 Penn. Stats. 402; *Tate v. Citizens Mut. Fire Ins. Co.*, 13 Gray, 79.)

The case made by appellant is stronger against itself in this latter regard, as there can be no doubt that up to the time of closing the application Hopkins was the agent of the appellant for all purposes touching the insurance, and any proper notice to him would have bound his principal; but notice of intention is not a compliance with the terms of the stipulation, nor is it in reality any notice, because not notice of a fact. (*Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Cush. 470; *Kimball et als. v. Howard Fire Ins. Co.*, 8 Gray, 34.)

There was notice of a prior insurance; but that was coupled with the statement that it would expire on the eighteenth of June, 1868, so that the agent was right in returning "no insurance," with the direction that the policy should take effect on the eighteenth, as on that day there would be, if applicant's answer was correct, no existing insurance, and if incorrect, her policy would be vitiated by the misstatement, at option of his principal. Possibly, had the property been destroyed on that very day, it would have been covered by both policies, and appellant have been responsible by reason of the representation of its agent, acting within the scope of his authority, that there was "no insurance," when, in fact, there was one covering the eighteenth, or some portion thereof; but, practically, the view of the agent was correct and his representation right, and the policy of appellant was issued and stands without any prior insurance upon the property.

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Waiving, for the present, the question of renewal, and considering the Hamburg and Bremen policy an original subsequent insurance, pure and simple, was there any compliance on the part of respondent with the stipulation? It is claimed that there was a substantial compliance arising from the notification of intention to obtain other insurance, as renewal of prior. Aside from the fact that such notice is in itself insufficient, and that it was not communicated, according to respondent's own testimony, to any person but Hopkins, who at the time stated by her could not receive it to bind appellant, what can this Court call a substantial compliance with the terms of such stipulation, save one exact? To make such attempt would be to leave insurance contracts to the idiosyncracies of Courts and Judges, who might pronounce as many different decisions as their different *media* of view.

There is but one safe rule, and that is to take the contract as written, subtracting nothing therefrom, adding nothing thereto. (*Conway Tool Company v. Hudson River Ins. Co.*, 12 Cush. 144; *The President, Directors, etc. of Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. 265; *Bigler et als. v. The New York Central Ins. Co.*, 22 N. Y. 402; *Carpenter v. The Providence Washington Ins. Co.*, 16 Pet. 495; *Hale v. Mechanis' Mut. Fire Ins. Co.*, 6 Gray, 169; *Gilbert v. The Phoenix Ins. Co.*, 36 Barb. 372.)

Without further particular quotation, hear the apt language of the Court in the last case cited, and the strong expressions in the first. In the former, the stipulation was substantially as in the present. Says Johnson, J.: "The parties had clearly the right to stipulate between themselves as to the nature and kind of evidence by which their assent to other insurances should be manifested. And where they have thus stipulated, the Court has no power to substitute any other evidence differing in kind or degree. To do this would be to make a new contract, which peradventure the parties themselves would never have made. The Court is to enforce contracts which the parties have made, but has no power to make new contracts for them, or to alter or vary in any essential particular those they have mutually agreed to be bound by. That this matter, of the kind and degree of evidence by which the assent of

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the insurers to other insurances upon the same property shall be established is no mere matter of form or ceremony, but of vital importance, will be readily conceded by every one who has been much in the practice of determining disputed questions of fact upon conflicting testimony. The uncertainty of even the most tenacious memory, the liability to misunderstand, and the difficulty of reporting accurately, after a lapse of time, a mere verbal communication, are matters of every day's observation, and it is not at all surprising that parties should provide for more certain and reliable evidence of important and controlling facts in their contracts."

"That such an agreement is valid, and the policy rendered void, by failing to have other insurances mentioned in, or indorsed upon, the policy, or acknowledged in writing according to the terms of the contract, is now, I think, well settled by authority."

In the latter case, upon similar stipulation, says Chief Justice Shaw: "When the terms and stipulations in a contract are plain and clear, we are bound to follow the terms, as the only authentic expression of the intentions of the parties; and in such case there is no room for exposition. It may be that the main purpose of such notice was intended to be, that the company might know what other insurances would be contributory in case of loss. But this may not have been the only purpose. Others at least may be supposed—such as having the best and most satisfactory evidence before them, and on their own books or files, of the whole amount at risk on the same subject at the same time. There is a provision in the policy, that the company may, on certain notice given, return a proportion of the premium, and rescind the contract. Notice of all insurances may be necessary to enable them satisfactorily to exercise this right. But as already said, whatever may have been the purpose, here was the express stipulation; and to imagine a supposed purpose, and qualify the stipulation so as to give it effect or not, as it would subserve that purpose, would be to ingraft an exception on the contract which the parties have not inserted, and make that conditional which they have made absolute." (*Conway Tool Co. v. Hudson River Ins. Co.*, 12 Cush. 150.)

It is claimed that there is a difference, and that distinction should be made between a renewed policy and one original; and

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that the Hamburg and Bremen policy of respondent is, in fact, a renewed policy, of which appellant had notice. Respondent's strongest witness in this respect is Hopkins, who testifies that he was notified of an existing insurance, and perhaps of intention to renew.

With reference to notice of intention to renew, as with notice of intention to apply, mere notice of intention is not sufficient. Take the fact of existing insurance, coupled with notice of intention to renew, and add the fact of renewal at a subsequent date; without notice to appellant of such ultimate fact, and there is failure to comply with the stipulation.

It was said in a case coming from an able Court, that "the taking of a policy of insurance, in renewal of the prior insurance mentioned in the application for the first-named policy, was not within the terms or spirit of the provision in the latter policy requiring notice in case of making other insurances." (*Brown v. The Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 371.) It will, however, be seen upon examination of the case cited, that it was decided upon other grounds, and with reference to other points; and although the expression is entitled to weight, because made in the view of a new trial, and its effect upon instructions of the Court below; and although it is to a certain extent sustained by the case of *The First Baptist Society in Dunstable v. Hillsborough Mut. F. I. Co.*, (19 N. H. 580); still, even in the absence of opposing authority, which is not the case as will be seen, such doctrine cannot stand—save upon the untenable basis, that Courts may decide what is substantial compliance with the unambiguous conditions and stipulations of such a contract, and substitute their own interpretation for that of the parties. It was upon this theory actually, that the decision was made in the case last cited, the Court saying: "The defendants' contract must be considered to be for an insurance for five years, with a double insurance to the amount of two thousand five hundred dollars, to subsist during the whole term. The plaintiffs might have renewed their insurance with the same company at Concord, without affecting their policy, and without further consent—the facts to which the defendants had already consented, continuing then to exist in every particular. But the

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words "in a company in Concord" are descriptive merely. They form no part of, nor can they affect, the real contract between the parties; they cannot be construed as one of its conditions, to preclude, by their own force, the plaintiffs from insuring in any other company. It was unimportant to the defendants in what company the other insurance was effected. The insurer's contract is in no respect affected, or the risk increased, by conceding this latitude of choice to the insured.

"If they be considered part of the notice to the defendants, they were, as has been already said, unnecessary—notice of a fact immaterial under the provisions of the fifteenth section—and when the plaintiffs insured in the Protection office instead, that fact was equally immaterial."

If a Court can say in such regard that one matter is unimportant, another immaterial—where the stopping place? In the case of *Burt v. People's Mut. Fire Ins. Co.*, (2 Gray, 398) the point was directly urged by counsel, in brief, and the Court replies: "The plaintiff's suggestion, that a policy procured by him as a renewal of a former policy, or as a substitute for it, is not within the meaning and effect of the defendants' by-laws, seems to us to be groundless."

This opinion is without argument, but there is sufficient reason given in the cases previously quoted from 12 Cushing and 36 Barbour; and such naturally suggests itself. There may be a difference in value of property insured at different times; there may be a change in the financial status of a company; there may be one or a thousand reasons, or none, for the stipulation; but why search or argue, when the root of the whole matter is, that there stands the stipulation, portion of a contract between parties competent to contract, which cannot lawfully be enlarged, diminished, nor altered, by any Court.

In the present case the stipulation provides for "notice of any other insurance already made or which shall afterwards be made elsewhere on the same property." Even if the Hamburg-Bremen policy be considered a renewal, still it is a new contract and other insurance within the meaning of the stipulation. (*Brady v. Northwestern Ins. Co.*, 11 Mich. 444.)

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The District Court gave the law correctly to the jury thus: "If you find from the evidence that the plaintiff procured another insurance with the Hamburg-Bremen Fire Insurance Company upon the same property covered by the policy sued on, notice by the plaintiff to the defendant of her intention to apply for or procure such other insurance is not a compliance with the stipulations of the policy sued on, which requires actual notice of other insurance at the time, or after it has been or shall have been made.

"If you find from the evidence that the plaintiff procured another insurance with the Hamburg-Bremen Fire Insurance Company upon the same property covered by the policy sued on, and that the plaintiff did not give notice to the defendant, or its authorized agents, of such other insurance, then by the terms and conditions of the policy sued on, such policy became void."

The jury found against the evidence and contrary to the law, and there is no conflict in the testimony which should prevent a Court from setting aside the verdict, even upon the ground that the same is contrary to the evidence.

The appellant's specification is, "that having obtained from the Hamburg-Bremen Fire Insurance Company a policy of insurance on the same property insured by the defendant subsequent to the issuance of the policy by defendant sued on, plaintiff failed to give defendant notice of obtaining said subsequent policy, as required by the stipulations made and indorsed on the policy issued by defendant." The assignment is good, and fully sustained in any and every proper view and aspect of the case.

The order of the District Court was error, and must be reversed, the judgment vacated, and the cause remanded for a new trial.

The County of White Pine v. Ash.

THE COUNTY OF WHITE PINE, RESPONDENT, v. AUGUSTUS ASH, APPELLANT.

NEW COUNTIES—TAXES ON PROCEEDS OF MINES. Under the Act creating White Pine County, (Stats. 1869, 137) which took effect on April 1st, 1869, the Assessor and *ex officio* Tax Collector proceeded in April to assess the proceeds of mines in his county, and collected the tax levied on the same for the quarter ending March 31st, 1869, and preceding the organization of the new county: *Held*, that the tax for that quarter was properly assessed, levied, and collected in and as of White Pine County.

FIRST-QUARTER TAXES ON PROCEEDS OF MINES. Taxes on proceeds of mines for the first quarter of the year cannot be assessed, levied or collected, before the first Monday of April of such year; and they are to be assessed, levied, and collected by the officers of the county in which the mines are then situated, though they may have been during such quarter in another county.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The facts are stated in the opinion.

F. W. Cole, for Appellant.

F. H. Kennedy, for Respondent.

[No briefs on file.]

By the Court, JOHNSON, J.:

This is an action to recover of defendant a stated amount of moneys collected by him as taxes on the proceeds of mines in said county. The case was tried in the Court below on an agreed statement of facts, and the judgment was for plaintiff, from which defendant appeals. The matters in issue will be explained by the following statement:

By virtue of "An Act to create the County of White Pine, and to provide for its Organization," (Stats. 1869, 137) which Act took effect from and after the first day of April, 1869, a separate county named as above was created out of territory which formerly was in Lander County. Under the Act referred to, defendant became

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Assessor, and *ex officio* Collector of certain taxes in said County of White Pine ; that between first Monday of April and May, 1869, he assessed the proceeds for the previous quarter—ending March 31st—of the mines in said county. On the tenth of April, the Board of Commissioners of White Pine County levied the amount of tax authorized by law on such proceeds, which the defendant afterwards collected—the payment thereof being made under protest—on the grounds, we infer from counsel's points, that the product of these mines being for the quarter preceding the establishment of White Pine County, is therefore not taxable in said county ; and it is understood that defendant withholds these moneys merely for the purpose of having his responsibility, whether to the county or the protesting tax payer judicially determined, so that he may act advisedly in the premises. Therefore, the only question before us seems to be, whether the authorities of White Pine County had lawful right to assess, levy, and collect the taxes aforesaid, which question must necessarily be determined upon the statutes relating thereto. It is provided :

1st. That a tax shall be imposed upon the assessed value of all taxable property in the State, including the proceeds of mines and mining claims. (Stats. 1867, 159, Sec. 1.)

2d. The proceeds of all mines shall be assessed and taxed in the county wherein the mine or mines are located. (Stats. 1864-5, 308, Sec. 105.)

3d. The Assessor is required to assess the proceeds of mines in his county for the first quarter of the year, as in this case, between the first Monday of April and May. (Stats. 1864-5, 307, Sec. 101.) And the assessment and collection of such taxes in each quarter shall be for the preceding quarter year. (Stats. 1867, 160, Sec. 4.)

4th. The Assessor is required to pay these tax collections to the Treasurer of the county where assessed and collected. (Stats. 1864-5, 312, Sec. 114.)

It is seen that the organization of White Pine County dates back to the first day of April, 1869, after which time the powers and duties of its officers under the revenue laws of the State were precisely the same as in other counties. It is further shown, that the

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mining tax for the quarter ending March 31st, 1869, could not be lawfully assessed, levied, or collected, before the first Monday—in this year the fifth day—of April. At this date, the mines from whence came the taxable product, by the creation of another county, had been withdrawn from the jurisdiction of Lander County and its officers. But this act did not absolve the mine-owner from liability for such tax, but simply transferred the assessment levy and collection of it to another set of officers, to wit: of the county in which the mines were located. This view is in harmony with the various provisions of statutes herein cited, nor do we find anything in conflict with it.

It therefore follows, that the defendant, as such Assessor, was fully empowered to collect these taxes, and payment thereof should be made to the Treasurer of White Pine County as by law provided. Judgment affirmed.

JOHN COVINGTON *et als.*, RESPONDENTS, v. JOHN BECKER *et als.*—E. LAMB, APPELLANT.

5	281
6	208
6	217
7	280
8	291
14	200

WATER RIGHTS—NO RIPARIAN PROPRIETORSHIP ON PUBLIC LAND. In a suit to enjoin the diversion of water from a river, which was first appropriated by the plaintiffs, it was stipulated that “the only title to the lands of plaintiffs and defendants is a possessory one, the fee being in the General Government: *Held*, that this agreement rebutted the proposition of a defendant that he was a riparian proprietor, or could claim the water as such.

APPEAL ON CONFLICT OF EVIDENCE. A judgment will not be set aside by the Supreme Court on the ground of being contrary to the evidence, where there appears to be a conflict of evidence, unless there be such a decided preponderance against it as to create a conviction that it was the result of mistake or misconduct.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

This was an action for an injunction brought by John Covington, George M. Dyer, A. F. Kerchival, and G. A. McCracken, against John Becker, E. Lamb, and a large number of others, to restrain them from diverting the waters of Reese River at a point about fifteen miles south of Jacobsville. It appears that the plaintiffs pos-

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essed lands through which the river flowed, and used its waters for agricultural purposes. The defendants respectively possessed lands further up the river, and it is alleged that after the appropriation by plaintiffs, as above stated, they diverted all the water for their own agricultural purposes. Lamb possessed four hundred and forty acres, and the river ran through it.

By the decree, the action was dismissed as to a number of the defendants; but Lamb was enjoined from diverting more of the water of the river during the dry season than was necessary to irrigate fifteen acres of ground cultivated in grain and vegetables, and from diverting water to any extent which would prevent a stream one foot in width and five inches in depth from flowing into plaintiffs' land.

D. W. Welty, for Appellant Lamb.

George S. Hupp and *Wren & Croyland*, for Respondents.

By the Court, WHITMAN, J. :

This case was originally appealed by Covington *et als.*, plaintiffs, in the Court below, and one of the defendants named Lamb. The former have dismissed their appeal, and Lamb is alone before this Court.

The assignments of error are numerous, but all, with the exception of the fourth, are addressed to the specification of error in the findings and judgment on matters of evidence. The fourth assignment referred to above is as follows :

“That these defendants are riparian proprietors on Reese River above the land of plaintiffs, and are entitled to use the water of the stream in irrigating their lands for agricultural purposes, without any liability on that account to plaintiffs.”

The agreement in the record rebuts the proposition that Lamb is a riparian proprietor thus : “The only title to the lands of plaintiffs and defendants is a possessory one; the fee being in the General Government.” The law applied in the case was that universally recognized in this State and California in such state of facts—that of prior appropriation; and it is not complained that it was incorrectly applied, if the findings were warranted by the evidence, save upon the hypothesis that Lamb was a riparian proprietor. As to

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that fact, in the sense intended by the assignment, it has been seen that Lamb has agreed himself out of Court. If the fact was otherwise, and as claimed in the assignment, it would be doubtful, to say the least, under the weight of authority at the present time, if he would be thereby benefited. (*Lobdell v. Simpson*, 2 Nev. 274.) As this question, generally considered, may and probably will become of extreme and practical importance, it is not intended to intimate any opinion thereon, as it is not necessary under the facts for the decision of this case.

As to the other assignments, they are covered by the rule laid down in *Quint and Hardy v. The Ophir Silver Mining Co.*, (4 Nev. 304) as follows: "The law is now thoroughly settled that a verdict will not be set aside by an Appellate Court upon this ground [conflict of testimony] when the lower Court has refused to do so, unless there be such a decided preponderance of evidence against it as to create a conviction that it was the result of mistake or misconduct on the part of the jury." There is, in this case, certainly substantial evidence to warrant the decision of the District Court, complicated and contradictory in some particulars it is true, but yet it must be confessed, upon entire perusal, that it does not clearly appear that appellant has any legal cause for objection. The findings and decree are as favorable to him as the whole testimony justified.

The order refusing motion for new trial, and decree of the District Court, are correct, and must be affirmed.

It is so ordered.

GEORGE L. GIBSON, RESPONDENT, v. H. S. MASON,
TREASURER OF ORMSBY COUNTY, APPELLANT.

POPULAR GOVERNMENT. The maxim that all political power originates with the people lies at the foundation of our political system; but after the organization of government it is only through their representatives that the people can exercise it.

FEDERAL AND STATE POWERS. The Federal Government was organized by the concession to it of such certain specified powers as were deemed necessary to secure and promote the general welfare of all the States, the residuum being

5	283
6	40
11	408
12	275
14	368
15	258
5	283
21	264
21	394
30*	690
32*	438

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retained by the people; and these reserved powers are supreme and absolute over life, liberty, and property, except as restrained or limited by their own concessions through the Federal Constitution.

RESERVED SOVEREIGN POWERS OF THE STATES. The powers reserved by the people from the Federal Government have never been, nor are they in any instance exercised by the people at large, but by the governments of the States, which are clothed with all the sovereign authority so reserved.

CO-ORDINATE BRANCHES OF STATE GOVERNMENT. Each department of the State government—legislative, executive, and judicial—is supreme within its respective sphere,

LEGISLATIVE POWER OF STATE LEGISLATURE. The State Legislature possesses legislative power unlimited except by the Federal Constitution, and such restrictions as are expressly placed upon it by the State Constitution; it is within the sphere of legislation the exponent of the popular will, endowed with all the power in this respect which the people themselves possessed at the time of the adoption of the Constitution.

THE LEGISLATURE THE JUDGE OF EXPEDIENCY. The power to make the law must necessarily carry with it the right to judge of its expediency and justice.

ORMSBY COUNTY RAILROAD BONDS. The Act authorizing the issuance of the bonds of Ormsby County to the Virginia and Truckee Railroad Company (Stats. 1869, 48) is not unconstitutional.

LEGISLATIVE POWER AS TO AIDING RAILROADS. Section ten of article eight of the Constitution, which prohibits counties, cities, and towns from becoming stockholders in corporations, or loaning their credit in aid of any corporations, except railroad companies, though it does not *confer* any right upon such organizations, does not prevent the Legislature from authorizing a county to aid a railroad, either by loaning its credit, donation, or otherwise.

MEANING OF "LOANING CREDIT." To allow a county to loan its credit to a railroad company (Const., Art. VIII, Sec. 10) is virtually allowing a donation, because the right to loan its credit must involve the right to pay any liabilities which may be incurred by that means.

MEANING OF "DUE PROCESS OF LAW." By "due process of law," as used in section eight of article one of the Constitution, is meant such general legal forms and course of proceedings as were known either to the common law, or as were generally recognized in this country at the time of the adoption of the Constitution.

COLLECTION OF TAXES BY SUMMARY PROCESS. The power of taxation carries with it the right and power of collecting taxes by summary process.

LOCAL OR SPECIAL LAW OF TAXATION. Section twenty of article four of the Constitution, so far as it forbids local or special laws "for the assessment and collection of taxes," was intended simply to inhibit local or special laws respecting or regulating the manner or mode of assessing and collecting taxes, and does not prevent the Legislature from authorizing or directing County Commissioners from levying a special tax by the passage of a local law.

MEANING OF "FOR ASSESSMENT AND COLLECTION OF TAXES." The word "for" in section twenty of article four of the Constitution, which inhibits local or special

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laws "for the assessment and collection of taxes," means "with respect to," or "with regard to."

LEGISLATIVE POWER OF TAXATION UNLIMITED. So far as the extent of taxation is concerned, or the purposes for which taxes may be levied, provided such purposes are public in their nature, there is no limit or restriction placed upon the legislative power.

RAILROADS PUBLIC IMPROVEMENTS. A railroad is a public improvement and a proper object for public aid; and the mere fact that private individuals are to own it and receive the tolls in no wise impairs or diminishes the advantages to be derived from it to the public.

RAILROAD USES PUBLIC USES. It is only on the ground that railroads are public improvements that private property can be condemned for their uses; for in no case can private property be taken, even where just compensation is paid, except for public uses.

COUNTY BONDS FOR RAILROAD AID. As money may be raised by taxation for aiding railroads, bonds may be issued for the same purpose to be paid by means of taxation.

TAXATION FOR INTEREST OF UNISSUED COUNTY BONDS. Under the Act authorizing the issuance of the bonds of Ormsby County in aid of the Virginia and Truckee Railroad Company, (Stats. 1869, 43) the County Commissioners of that County, before the issue of the bonds, levied a tax for the purpose of meeting interest: *Held*, that the levy was not premature, any more than a levy would be for any other anticipated liability.

STATUTORY CONSTRUCTION—OBJECT AND MEANS. As it is a rule of construction that when anything is required to be done the usual means may be adopted for performing it, the Courts, in the interpretation of statutes, so construe them as to carry out the manifest purpose of the Legislature; and this has been done in opposition sometimes to the very words of an Act.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The defendants in this action were H. F. Rice, S. E. Jones, and A. B. Driesbach, as and composing the Board of County Commissioners, and H. S. Mason, County Treasurer and *ex officio* Tax Collector of Ormsby County. The Treasurer and County Commissioners took separate appeals from the orders allowing and refusing to dissolve the injunctions against them respectively. The following opinion was written on the appeal of the Treasurer, but, as will be seen, it covers the appeal of the Commissioners also.

Hillyer, Wood & Deal, for Appellants.

I. The Legislature had power to authorize and direct the county

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bonds to be issued to the Railroad Company. (*Gelpecke v. City of Dubuque*, 1 Mallatt, 175; 30 Cal. 435; 27 Cal. 175; 22 Cal. 379; 23 Cal. 323; 26 Cal. 642; 15 Coms. 475; 18 N. Y. 38; Sedgwick on Const. and Stat. Law, 180-188.)

There is no prohibition in the Constitution. Section ten of article eight prohibits nothing as to railroad companies. If a donation is included in the expressions "become a stockholder," or "loan its credit," then railroad companies are expressly excepted from the operations of the section. If donation is a distinct thing and not included in those expressions, then a county is not prohibited from making a donation, even to other corporations and associations than railroad companies. Upon no construction is anything forbidden in respect to railroad companies.

The power cannot be denied by implication, nor otherwise than by a positive prohibition, clear beyond doubt. (26 Cal. 161; 24 Wendell, 215; 24 Barb. 248; 17 N. Y. 235; Sedgwick on Const. and Stat. Law, 483.)

II. The tax was not prematurely levied. The levy was in literal compliance with the wording of the Act, for it was levied annually at the same time as other taxes. It was in compliance with the spirit of the statute—for the purpose of the Act was to meet the interest when due, and this could only be done by a levy made in this year.

The State had full power over the subject and authority to direct the tax to be collected before the bonds might be issued. The Commissioners, not being restricted by special statutory directions, had a right to use their discretion—to take cognizance of facts and probabilities as in regard to most other taxes, and make the levy in time to save the credit of the county, and fulfill the provisions which they were morally certain they would be compelled by law to make. (22 Ind. 204; 23 Geo. 566; 32 Eng. Law and Eq. 249; 19 Mo. 187; 13 Cal. 343; 14 Cal. 148; 11 Penn. State 61; 10 Mass. 115.)

Clayton & Davies, for Respondent.

I. The Act in question is in conflict with section ten, article eight, of the Constitution. That section, in the old Constitution of

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1863, prohibited counties from subscribing to the stock of, or lending credit to, any corporation whatever; and it was the manifest intention of the constitutional convention of 1864 to amend it only to the extent of allowing counties, cities, etc., to subscribe for stock of railroad companies, or to lend their credit in aid of such companies: no farther power was to be allowed. The right to donate was not contemplated. The design was to prevent injudicious investments of the general property of the people of a county or city in joint stock companies, and to allow such investments to be made in the stock of railroad corporations only where an equivalent in the shape of mortgage bonds or capital stock was received in return.

II. The Act conflicts with section nine, article eight, of the Constitution, which provides that "The State shall not donate or loan money, or its credit, subscribe to, or be interested in, the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." Now, while the State is allowed to donate for certain purposes, no provision is made for counties to do so; and as this kind of a transaction, *nudum pactum* as it is, is universally discouraged at law, no such right can be exercised, unless the same is expressly granted. Again, if the Legislature can compel the county of Ormsby to donate to a railroad corporation, it can in the same way compel every other county in the State to do the same thing, and thus practically donate the money and credit of the State in defiance of the Constitution.

III. The Act is repugnant to section eight, article one, of the Constitution of this State, and to article five of the amendments to the Constitution of the United States, which provide that "No person shall be deprived of his property without due process of law."

Statutes which would deprive a citizen of the rights of person or property without a regular trial, according to the course and usage of the common law, would not be the "due process of law" in the sense of the Constitution. (*Hoke v. Henderson*, 4 Devereux, N. C. 12; 2 Coke, Litt. 50; 3 Story on Const., 264 and 661; 1 Kent's Com. 612, 613, and note c; 2 Yerger, 500; 10 Yerger, 71; 4 Hill, 145; 18 Wendell, 59; 19 Wendell, 675; 5 Paige,

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159; 5 Barbour, 481; 3 Comstock, 516.) The Act is also repugnant to the provisions which forbid the taking of private property for public use without just compensation. While private property may be taken, upon just compensation, for public use, it cannot be taken, against the consent of the owner, for private use, even when just compensation is made or offered; and much less can it be taken for private use without just compensation. (18 Wendell, 59; 19 Wendell, 675; 4 Hill, 145.)

IV. The Act is in violation of section twenty, article four, of the Constitution, which forbids local or special legislation in regard to the assessment and collection of taxes for State, county, or township purposes. If this tax is not for any of these purposes, the Legislature had no right to impose it; if it is for any of these purposes, special legislation concerning the same is expressly forbidden.

V. The Act, the effect of which is to divest the property of one, and transfer the same to another, is an attempt on the part of the legislative department to exercise functions appertaining to the judiciary, which can only be done by sentence of a competent Court. (4 Devereux, N. C. 12; 3 Scammon, 238.) And in so far as it thus attempts to take property without giving anything in satisfaction, the act is repugnant to natural justice. (*Wilkinson v. Leland*, 2 Peters, 657; 9 B. Monroe, 345; 4 Ohio, 291.)

VI. All political power is lodged originally in the people, and all power not granted in the Constitution to one of the three coördinate branches of the State Government, still remains in the people to be exercised as they see fit. Has the Legislature the power to compel a county to lend its credit to or subscribe for the stock of a railroad corporation? The better course would seem to be, and one more in keeping with the fundamental maxims of a free government, to submit such propositions to the voters of the county. If the Act is constitutional and just, then with equal propriety might the Legislature at its next session require the people of Ormsby County to donate to any person it might choose, one hundred thousand dollars, upon his building a substantial edifice for his private residence in Carson City.

Under our form of government, the Legislature is not supreme. It is only one of the organs of that absolute sovereignty which

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resides in the whole body of the people ; like other departments of government, it can only exercise such powers as have been delegated to it ; and when it steps beyond that boundary its acts, like those of the most humble magistrate of the State, who transcends his jurisdiction, are utterly void. (*Billings v. Hall*, 7 Cal. 10 ; *Nougues v. Douglass*, 7 Cal. 70 ; *Hanson v. Vernon*, 3 Western Jurist, 134 ; *Whiting v. Sheboygan R. R. Co.*, 1 Chicago Leg. J. 378 ; *Curtis v. Whipple*, Leg. J. 335.)

By the Court, LEWIS, C. J. :

This appeal is taken from an order granting an injunction against the defendant, whereby he is restrained from collecting a certain tax levied by the Commissioners of Ormsby County in pursuance of authority conferred by an Act of the Legislature, approved January 27th, A.D. 1869.

It is attempted here to sustain the action of the Court below upon the grounds : 1st, that the Act authorizing the tax in question is unconstitutional and void ; and 2d, that under the terms of the law itself, the tax is prematurely levied. The Act directing the levy of this tax also authorizes the Commissioners to issue to the Virginia and Truckee Railroad Company the bonds of the county to the extent of two hundred thousand dollars, the tax in question being levied to meet the interest to accrue on them. An injunction was also issued by the same Court at the same time enjoining the issuance of these bonds, from which an appeal is likewise taken by the Commissioners. As the unconstitutionality of the Act is the only ground upon which it is attempted to justify the second order, it will only be necessary to consider the first appeal, as that embraces the sole question involved in the second. A clear understanding of the nature of the law and the character of the tax, the collection of which is enjoined, may be obtained from these sections which embody its principal features :

Section 1. " Whenever, within eighteen months from the passage of this Act, the Virginia and Truckee Railroad Company, a corporation existing under the laws of this State, shall have completed the construction of a first class iron railroad from some point within the limits of the City of Carson to a point upon the county

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line of Ormsby County, on the line of a railroad between said city and the City of Virginia, Storey County, and the same shall be in complete readiness to receive the rolling stock proper therefor, the Board of County Commissioners of Ormsby County are hereby authorized and directed to prepare and issue the bonds of said county to the amount of two hundred thousand dollars, in the form hereinafter specified, and deliver the same to the Virginia and Truckee Railroad Company, for its benefit.

Sec. 3. "Immediately after being notified by the Company of the fulfillment of the conditions upon which said bonds are to issue as above stated, the Board of Commissioners shall proceed to satisfy themselves, by personal inspection or otherwise, of the fact of the performance of said conditions, and on being so satisfied shall without delay prepare, issue and deliver the bonds as above directed: *provided*, that the certificate of the Surveyor-General of the State and the County Surveyor of Ormsby County to the fact of fulfillment of said conditions shall be conclusive evidence thereof to said Commissioners.

Sec. 4. "The said Board of County Commissioners are hereby authorized and required to levy and collect annually, until all of said bonds issued under the provisions of this Act shall have been fully paid or provided for, a tax of one per cent. upon all taxable property of Ormsby County, to be applied exclusively to the payment of the principal and interest of said bonds, to be issued as herein provided: *provided*, that for the first two years after the issuance of said bonds, the surplus of the proceeds of said tax, if any there be, after the payment of said interest, shall be paid into the General Fund of said county, and after said two years said surplus shall be used in the Redemption Fund as hereinafter provided.

Sec. 5. "The said Board of County Commissioners are further authorized and required to levy and collect annually, during the five years succeeding the two years above mentioned, such tax upon all the taxable property in Ormsby County, in addition to the aforesaid tax of one per cent., as shall be sufficient to raise the sum of five thousand dollars per annum, to be applied exclusively to the redemption of the said bonds to be issued as herein provided. And after said five years the said Commissioners shall levy and collect annu-

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ally, in addition to said tax of one per cent., such further tax, if any shall be necessary, as will be sufficient to pay the accruing interest, and to redeem annually one-eighth of the amount of bonds outstanding at the end of seven years from the date of this issuance.

Sec. 6. "The amount raised by the tax levied as above required, and not hereinbefore directed to be placed in the General Fund, shall be placed in a separate fund, to be called the 'Railroad Interest and Sinking Fund,' which shall be applied: First, to the payment of the semi-annual interest, as above directed; and second, to the redemption of said bonds, as provided in the following sections."

This law is claimed to be repugnant to natural right and justice; and it is argued, as there is no specific power granted to the Legislature authorizing the passage of such a law, it must be held unauthorized and void. To answer this branch of the argument for respondent, it becomes necessary to ascertain the limits of the legislative power of the State, and the extent of the judicial power to annul or circumscribe legislative action.

The maxim, which lies at the foundation of our government, is that all political power originates with the people. But since the organization of government, it cannot be claimed that either the legislative, executive, or judicial powers, either wholly or in part, can be exercised by them. By the institution of government the people surrender the exercise of all these sovereign functions of government to agents chosen by themselves, who at least theoretically represent the supreme will of their constituents. Thus, all power possessed by the people themselves is given and centered in their chosen representatives. The Federal Government was organized by the concession of such specified powers to it as were deemed necessary to secure and promote the general welfare of all the States; but the governmental powers so conferred are admitted to be limited to the few objects for which that government was created, the residuum being retained by the people. The power so reserved must be admitted to be supreme and absolute, over life, liberty, and property, except as restrained or limited by their own concessions through the Federal Constitution. Although possessed by them, it is not now, nor has it ever been, exercised by the people at large in any portion of the Union. But another government, that of the

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State, is formed, which is usually clothed with all the sovereign authority reserved by the people from the grant of powers in the Federal Constitution. This is accomplished in this as in all the States but one, by means of the Constitution adopted by themselves, whereby all political power is conferred upon three great departments, each being endowed with and confined to the execution of powers peculiar to itself.

The legislative is vested in two bodies, the Senate and Assembly; the judicial is conferred upon certain designated Courts; and the executive upon the Governor. By the law so creating the government, certain rights are generally reserved by the people, and so placed beyond the control of, or infringement by, any of the departments of the State organizations.

The government so organized is the repository of all the power reserved by the people from the General Government, except such as may be expressly denied to it by the law of its creation, each department being supreme within its respective sphere, the Legislature possessing legislative power unlimited except by the Federal Constitution, and such restrictions as are expressly placed upon it by the fundamental law of the State—the Governor having the sole and supreme power of executing the laws, and the Courts that of interpreting them. But it has been denied by some eminent jurists as it is by counsel in this case, that the Legislature is endowed with this plenary power; and it is contended that there are other restrictions upon its authority beside the provisions of the Constitutions, Federal and State. It has not, to our knowledge, ever been held that the State Legislature is, like the Congress of the United States, confined in its legislative action to such powers as are expressly mentioned and delegated to it in the Constitution.

Such construction or holding would circumscribe its powers within such narrow limits, that probably not one State government in the Union would be able to maintain itself for any considerable length of time, with its present Constitution—for it does not seem to have been the design of the framers of any of those instruments to specifically designate all the powers desired to be conferred upon the legislative branch of the government, but rather to grant the power in general terms, and then to specify such restrictions upon

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it as might be deemed desirable. Such is the mode pursued by the framers of the Constitution of this State—thus it declares: “The legislative authority of the State shall be vested in a Senate and Assembly, which shall be designated the ‘Legislature of the State of Nevada’”; and then follow certain sections regulating the organization and the manner in which its duties are to be performed, together with others, imposing numerous restrictions upon this power, with but few subjects mentioned upon which it is expressly authorized to legislate. The Federal Constitution, on the other hand, specifically enumerates all the subjects respecting which the Congress of the United States shall legislate—hence, its powers are rigidly confined to such subjects. That course is not attempted to be pursued, either in the Constitution of this State or that of any other in the Union. The only constitutional provision conferring power of legislation is that quoted—excepting, indeed, the few cases in which laws are expressly required to be passed upon particular subjects. That it endows the Legislature with general powers of legislation can scarcely be questioned. But what is the extent of the authority thus granted? Does it embrace all the power of the people, or only a limited portion? Evidently the whole, except such as is expressly reserved and conferred upon the other two branches of the government. The Legislature is then invested with all the law-making power which could possibly be granted by the people. If not, where is it lodged? Certainly, not in either the judicial or executive departments; and nothing is clearer than that it is not retained by the people themselves, for they possess no power of legislation whatever. An Act of the Legislature made dependent upon their votes or approval would be utterly void—and so it has frequently been held. It is quite clear, that the Legislature is within the sphere of legislation the exponent of the popular will, endowed with all the power in this respect which the people themselves possessed at the time of the adoption of the Constitution.

But, notwithstanding this very evident investment of the Legislature with the sovereign and omnipotent political power of the people, it has been assumed by some Judges, and so argued in this case, that the Courts have the right to annul an Act of the Legis-

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lature upon the sole ground that it is unjust ; or, as it is put in this case, opposed to natural justice ; or, by some Judges, as against the " great principles of eternal right." We believe, however, that such doctrine cannot be reconciled with a correct view of our form of government and the distribution of its powers. Whence this power in the judiciary to pass upon the justice or injustice, the expediency or in expediency, of an act of a coördinate branch of the government ? It is not given in the Constitution. The Legislative power is not limited in that instrument to the enactment of just laws, or such as may, in the opinion of Judges, be deemed expedient. Nor did the people think it necessary in any way to guard themselves from laws incompatible with that uncertain thing called natural justice ; or to hedge themselves about with what Judges are pleased to call the principles of eternal justice. This question is simply one of power ; the Legislature either possesses it unlimited, or not at all. It cannot depend upon the extent or character of the injustice embodied in any particular law. The Courts are no more authorized to annul a law of the Legislature because opposed to the principles of natural justice, than because it may violate the simplest natural right. It cannot be supposed that the people, in delegating power to the Legislature, authorize it to violate the most indifferent natural right or justice any more than its most important or vital principles ; and so, if the legislative authority be so limited, the entire civil code must stand the severe test of natural justice, or be annulled by the judiciary. If the Courts possess such power, then indeed are all the other branches of the State government entirely under the control and supervision of the judicial. Courts can as well set aside an act of the executive upon the score of injustice, as that of the Legislature. If the Constitution has not limited the powers of the Legislature to the enactment of just laws, or such as do not conflict with the principles of natural justice, the Courts have no more right to so restrict it than they have to test the validity of a law by the dogmas of the Church, or the precepts of revealed religion. If the Legislature may be held to have transcended its power in enacting a law opposed to the first principles of right, it may be held to do so at the pleasure or caprice of Judges. The power is no more given in the one case than in the other.

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Such was not the will of the people as expressed in the Constitution, but rather that each of the three great departments should be supreme within its sphere. Surely, the power to make the law must necessarily carry with it the right to judge of its expediency and of its justice. It is evident that a law or legislative act may be clearly unjust in the individual case; opposed in its operations upon some individuals to the principles of natural justice; and still be not only an expedient law, but essential to the welfare of the community at large. Who is to determine that a law palpably and flagrantly unjust upon its face was not called for by an imperious public necessity? Certainly, the Legislature and not the Courts. They have admittedly no right to inquire into the question as to whether it were necessary or unnecessary, expedient or inexpedient, to adopt a law. Nor have they any greater right to inquire as to its justice or injustice for the purpose of annulling it. No Judge has ever attempted to carry this assumed power of the Courts to its legitimate and logical results, but all are daily acting in opposition to it. Thus, it is a violation of natural justice to deprive a man of the right to recover an honest debt after the expiration of a limited time, but no Judge has ever attempted to hold a limitation act void upon the ground of such injustice. It is clearly opposed to natural justice that a man should be protected in the enjoyment of luxury and a large amount of property, whilst those from whom he may have obtained all are not allowed to have satisfaction of their demands. Yet no Court will claim the right to decide an exemption law void because thus unjust.

Such law, while it does not directly transfer the property of one man to another, does what is equally unjust—protects him in its enjoyment after he has obtained it. Laws of a like character are daily coming under the observation of Judges, and as often sanctioned and upheld by them. Courts have no right to declare such law void because opposed to natural justice. The safest and best rule, and that most in harmony with our form of government and its distribution of power, is to maintain the supremacy of the Legislature while acting in its law-making capacity, and uphold all laws enacted by it which are not in conflict with some provision of the Federal or State Constitutions. Nor are these views unsupported

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by authority. They are justified by the decisions of the ablest Courts and the opinions of the most distinguished Judges of the land.

"The wisdom and justice of the representative body, and its relations with its constituents, furnish the only security when there is no express contract against excessive taxation, as well as against unwise legislation generally," is the language of Chief Justice Marshall in the Providence Bank case. In *Butler v. Palmer*, (1 Hill, 324) Mr. Justice Cowen remarked: "Strong expressions may be found in the books against legislative interference with vested rights, but it is not conceivable that after allowing the few restrictions to be found in the Federal and State Constitutions, any further bounds can be set to legislative power by written prescription."

"We cannot," says Mr. Justice Baldwin, in *Bennett v. Boggs*, (1 Baldwin, 74) "declare a legislative act void because it conflicts with our opinions of expediency or policy. We are not the guardians of the rights of the people of this State unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and protection of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but Courts cannot assume their rights." Mr. Senator Verplanck, in *Cochran v. Van Surlay*, (20 Wend. 381) thus ably and forcibly expresses his views upon this question: "It is difficult upon any general principle to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. There are indeed many *dicta*, and some great authorities, holding that Acts contrary to the first principles of right are void. The principle is unquestionably sound as the governing rule of a Legislature in relation to its own Acts, or even those of a preceding Legislature. It also affords a safe rule of construction for the Courts, in the interpretation of laws admitting of any doubtful construction, to presume that the Legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language if it be susceptible of any other more conformable to justice; but if the

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words be positive and without ambiguity, I can find no authority for a Court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions limiting legislative power, and controlling the temporary will of a majority by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of a judiciary powers too great and too undefined, either for its own security or the protection of private rights. * * * Believing that we are to rely upon these and similar provisions as the best safeguards of our rights, as well as the safest authorities for judicial direction, I cannot bring myself to approve of the power of Courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose and vague interpretation of a constitutional provision beyond its natural and obvious sense."

As early as the year 1798 this doctrine was thus emphatically declared by Judge Iredell, in the case of *Culder v. Bull*, (3 Dallas, 386): "If, on the other hand, the Legislature of the Union, or any member of the Union, shall pass a law within the general scope of their constitutional power, the Court cannot pronounce it to be void merely because it is in their judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the wisest men have differed upon this subject, and all that the Court could properly say in such an event would be, that the Legislature, possessed of an equal right of opinion, had passed an Act which in the opinion of the Judges was inconsistent with the abstract principles of natural justice.

"There are, then, but two lights in which the subject can be viewed: First, if the Legislature pursue the authority delegated to them, their acts are valid; second, if they transgress the boundaries of that authority, their acts are invalid. In the former case they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but, in the latter case they violate a fundamental law which

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must be our guide whenever we are called upon as Judges to determine the validity of a legislative act."

Again: "We are urged, however," says Chief Justice Black, in *Sharpless v. The Mayor of Philadelphia*, (21 Penn. State R. 147) "to go further than this, and to hold that a law, though not prohibited, is void if it violate the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the Constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The Constitution has given us a list of the things which the Legislature may not do. If we extend that list, we *alter* the instrument; we become ourselves the aggressors, and violate both the letter and the spirit of the organic law as grossly as the Legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar. If we can remove the landmarks which we find established, we can obliterate them. If we can change the Constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

- "The great powers given to the Legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rules will always hold it to the true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours the people have given larger powers to the Legislature, and relied for the faithful execution of them on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. * * * I am thoroughly convinced that the words of the Constitution furnish the only test to determine the validity of a statute, and that all arguments based

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on general principles outside of the Constitution must be addressed to the people, and not to us."

The Supreme Court of the United States, in the case of *Satterlee v. Matthewson*, (2 Pet. 380) admitted the law under consideration to be unjust, but because not in conflict with an express constitutional provision it was upheld. And, again, in *Fletcher v. Peck*, (6 Cranch, 87) it was said that while not transcending the constitutional limits, even the passage of a law by means of corruption would not invalidate it. We conclude, then, upon principle and the weight of authority, that although a law may be opposed to the first principles of right or natural justice, still, if not in conflict with some constitutional provision, State or Federal, the Courts have no power to annul or set it aside. All arguments, therefore, founded upon the injustice or hardships of the Act in question are entirely out of the case.

We may, then, direct our attention to the various constitutional objections made by counsel on behalf of the respondent. And it may as well be stated in the outset that the law cannot be declared unconstitutional unless it be clearly, palpably, and plainly in conflict with some of the provisions of the Constitution. This is a rule recognized by all the Courts, and probably has never been questioned. (*Ash v. Parkinson*, January Term, 1869, and cases there cited.) Is it, then, so in conflict with that instrument? It is argued by counsel that it is in several particulars. First, it is claimed that the issuance of the bonds in question is prohibited by section ten, article eight. If so, it follows, as a matter of course, that the tax levied to meet the interest on them is unauthorized and void. But we do not think the language of that section warrants the inference drawn from it, or the construction placed upon it by counsel. It declares that "No county, city, town, or other municipal corporation shall become a stockholder in any joint stock company, corporation, or association whatever; or loan its credit in aid of any such company, corporation, or association, except railroad corporations, companies, or associations." Here is simply a prohibition upon counties, cities, and towns; a restraint imposed upon them respecting subscription to the stock of certain companies or associations. There is no intention whatever mani-

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vested to *confer* any right or power upon such organizations: the whole power is embodied in the negative, "shall not become stockholders" or "loan their credit." But railroad companies are especially excepted from the companies or associations mentioned. It is as if those companies were in express terms exempted from the entire provisions of the section, for it simply prohibits aid by means of subscription or loaning credit to any but railroad companies. Now, it was not the intention either to limit or extend the power of a county or town respecting any aid they might choose to give to railroad companies. The exception of these companies from the other associations gives the counties or towns no more right to aid them than they would have had if the section were not embraced in the Constitution at all. It is, then, only by implication that they are allowed to loan their credit to such associations; and nothing is clearer, as we have already endeavored to show, that if not expressly prohibited the Legislature has the power to authorize a county to aid a railroad either by donation or otherwise. Is there anything in this section prohibiting a county to donate money to such companies? Certainly not; but the inference is rather the other way; for to allow them to loan their credit is virtually and substantially allowing a donation, because the right to loan its credit must involve the right to pay any liabilities which may be incurred by that means. And as, practically, the loaning of credit would, in a majority of cases, necessitate the payment by the county or town, it is hardly to be supposed the framers of the Constitution would have allowed this loaning of credit had they thought it desirable to prohibit any donation of money. If it was the intention to deny the right to donation, it is very clear that the right to loan their credit would not have been allowed, as that would simply be an indirect means of permitting the very act which it is claimed was intended to be denied.

Counsel argue that because the right is given to subscribe for stock in such companies and to loan their credit to them, it must be inferred no further or other right or power was intended to be allowed; but as has already been said, no such right is given, except by inference, in this section. Railroad companies are simply

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exempted from the provisions of the section, that is all. No right is given to counties or towns respecting them.

However, the section in question in no wise prohibits the donation of money to any association whatever. To donate money is one thing; to become a stockholder, or to loan credit, is another. The framers of the Constitution might very consistently have desired to protect the counties and towns of the State from the endless complications and uncertain liabilities necessarily attending an interest in companies and associations in general, or becoming surety for them, and still have permitted a donation of money which would be entirely free from everything of the kind.

By the very section preceding that under consideration, the State is prohibited not only from becoming a stockholder in any company or association, but also from donating money to them. Now, if it were the purpose to make the same prohibition respecting counties and towns, why were they not, like the State, expressly forbidden to donate? The failure to make the prohibition in express terms, under such circumstances, warrants the conclusion that it was not the intention to do so. Counties and towns, therefore, are not prohibited by this section from donating money to such railroad companies, if to any kind of company or association.

If, however, it be admitted that the first portion of the section, by prohibiting them from becoming stockholders, intended to inhibit donating also, still no such inhibition exists as to railroad companies, for they are exempted from all the prohibitions respecting other companies and associations; the exception or exemption respecting them must by all rules of construction be coëxtensive with the prohibition as to others.

Again, it is claimed the law is repugnant to section eight, article one, which declares that no man shall be deprived of his property without due process of law. Counsel have entirely misapprehended the purport of this expression, "due process of law." It does not, as claimed, guarantee a trial by jury in all cases where a citizen's liberty or property is involved. If so, there could be no commitment for contempt; and no deprivation of property by chancery proceedings, except by the intervention of a jury. But no lawyer will contend at the present day that a jury can be demanded in cases of

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that kind. By "due process of law," as used in the Constitution, is simply meant such general legal forms and course of proceedings as were known either to the common law or as were generally recognized in this country at the time of the adoption of the Constitution; committing for contempt by a mere order of Court, and the decision in chancery cases without the intervention of a jury, were as clearly due process of law in such cases as the trial by jury in a common law case.

How then can it be said that the expression "due process of law" guarantees a trial by jury, any more than by the Judge without a jury? Certainly, no new mode of proceeding is required by this provision, nor anything different from that known at the time of its adoption.

Evidently, nothing further was intended by it than to secure to the citizens the usual and ordinary means or course of judicial proceedings generally followed or observed in similar cases at the time it became a part of the fundamental law. But taxes were not either in England or this country (with perhaps the exception of one or two States) collected by the intervention of a jury, nor was it even recognized as the right of the citizen to demand such course of proceeding; on the contrary, it was almost the universal practice to collect them when delinquent by some summary process, such as the seizure of the property of the individual and exposing it for sale. The citizen not being entitled to claim a jury in such cases prior to the adoption of the Constitution, the present mode is as much by "due process of law" in the matter of collecting taxes, as a trial by jury is an ordinary action at law. Such is the conclusion arrived at by the Supreme Court of the United States in the case of *Murray's Lessee v. Hoboken Land Co.*, (18 Howard, 272); and upon this and similar provisions in the Constitutions of other States it has been held by every Court where the question has ever been suggested, that it does not prohibit the collection of taxes by summary process, that is, without regular judicial trial and judgment. The power of taxation which is plenary in the Legislature, carries with it the right and power of collecting taxes by a summary process. There are but few States in the Union where they are not so collected; and although the same inhibition is imposed upon the

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Federal Government, still its revenue is never collected by due process of law, as understood by counsel; but the officers are generally authorized to seize the property and expose it for sale without trial and judgment, and such course of proceeding has always been upheld. (*Williams v. Peyton's Lessee*, 4 Wheat. 77.) In *Parbour v. Decatur County*, (9 Geo.) it is said "the right to levy and collect taxes grows out of the necessity of the government, an urgent necessity which admits no property in the citizen while it remains unsatisfied. The right to tax is coeval with all governments. It springs out of the organization of the government. All property is a pledge to pay the necessary debts and expenses of the government." So in *The State v. Allen*, (2 McCord, 56) it is observed: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be an exception to the right of trial by jury, and is embraced in the alternative "law of the land."

Indeed, this question has been so frequently decided, and the right upheld, that it is no longer an open question, but may be considered finally determined.

It is also provided by the same section, that "private property shall not be taken for public use, without just compensation having been first made or secured." Nor does this provision, in any way, restrict the power of the State to seize, upon summary process, any property for taxes, and that, too, without securing or making compensation therefor. It can hardly be claimed that it does. Were it so, the State would be utterly powerless to support itself, because all taxes collected would unmistakably have to be redistributed to those from whom they were collected. See this question fully discussed in the case of *People v. Mayor of Brooklyn*, (3 Comst. 420); the Court thus drawing the distinction between the taking of private property for public use, and the right of taxation with its incidents of taking property in satisfaction of it: "Taxation exacts money or service from individuals, as and for their respective shares of contribution to any public burden. Private property, taken for public use by the right of *eminent domain*, is taken not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in

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the latter case, because the Government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay—otherwise, this is the proper application of the tax.

“Taxation operates upon a community, or a class of persons in a community, on some rule of apportionment. The exercise of the right of *eminent domain* operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals.” When, therefore, property is taken in satisfaction of a tax, it is not within this constitutional prohibition. But it is argued from this provision, by counsel, if private property cannot be taken for public use without just compensation, it cannot be taken for private use, claiming that the tax sought to be collected is simply for a private purpose; that it is levied for the benefit of private individuals; or that it is taking the property of one citizen and giving it to another. If this were a fact, we should unhesitatingly declare the law unconstitutional; but we intend to show that the tax is levied not for a private but a public purpose, and for the benefit of the community at large—hence, a consideration of this point is rendered unnecessary.

It is next argued that this law is repugnant to section twenty, article four, which prohibits the Legislature from passing local or special laws upon certain subjects, among which is that for the assessment and collection of taxes for State, county, and township purposes.

By this provision it was evidently intended simply to inhibit local or special laws, respecting or regulating the manner or mode of assessing and collecting taxes.

Assessment, as used in this section, evidently has reference to the duties of the subordinate officer, known under our laws as an Assessor, whose duty it is to ascertain the value of the taxable property, and determine the exact amount which each parcel or individual is liable for. The word “for,” too, must mean—with respect to, or with regard to, which is a definition given to it by lexicographers—and thus the language of the section will read: With respect to or regard to the assessment and collection of taxes for State, county, and township purposes. The law under consid-

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eration, however, contains no provision whatever respecting the assessment or collection of the tax complained of, in the sense in which those words are employed in the Constitution. It simply directs the levy of the tax, and in no way regulates the manner in which the proportion of each person is to be ascertained that is assessed; but this, and the method of collecting, is left to be governed by the general revenue law.

It clearly could not have been intended by the framers of the Constitution to require a general law for the levy of a tax for a special purpose in a county. As in a case of this kind, when no county but that of Ormsby is required to levy a tax, and this for a special purpose, and the amount to be levied is necessarily fixed—how could a general law be enacted to meet the necessities of the case, without requiring all the counties of the State to levy a like tax? It could not, with the construction which counsel for respondent place upon this section.

We are clearly of opinion that the constitutional provision simply prohibits special legislation regulating those acts which the assessors and collectors of taxes generally perform, and which are denominated “assessment” and “collection of taxes;” and that it does not inhibit the Legislature from authorizing or directing the County Commissioners from levying a special tax by the passage of a local law.

All the constitutional objections made by counsel have thus been noticed and found untenable. Here we might rest the case, affirming the validity of the law upon the absence of all constitutional provisions repugnant to it. But our conclusion upon the main question in the case—the legislative power to direct the issuance of these bonds, and to levy taxes for the purpose of paying them—need not be placed upon this ground alone, for it is an authority clearly embraced within the taxing power which is expressly granted to the Legislature. Its power upon this subject is full and complete. (*Ex parte Crandall*, 1 Nev. 294.)

“The power of legislation and consequently of taxation,” says Chief Justice Marshall, “operate on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the

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benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burden; and that portion must be determined by the Legislature. This vital power may be abused: but the interest, wisdom, and justice of the representative body, and its relation with its constituents, furnish the only security against unjust and excessive taxation as well as against unwise legislation." And, again, the same eminent Judge, in the case of *McCulloch v. State of Maryland*, (4 Wheat. 316) said respecting the same question: "It is admitted that the power of taxing men and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, then, government acts upon its constituents. This is, in general, sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right—resting confidently in the interest of the Legislature, and the influence of its constituents over their representatives, to guard them against its abuse."

This language is perfectly applicable and entirely true respecting the legislative power of this State; the power of taxation being given to it, and no restriction whatever placed upon its exercise, except that it is required to make all assessments of taxes equal and uniform, and also to tax mining property in a designated way. But so far as the extent of taxation is concerned, or the purposes for which taxes may be levied, there is no limit or restriction placed upon the power.

We do not wish to be understood as holding that the Legislature may enforce burdens upon or collect money from the citizens for any object that it may choose; for if it be imposed for a purpose not public in its nature—that is, if it be not strictly a tax which is

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defined to be "a rate or sum of money assessed on the person or property of a citizen by government *for the use of the nation or State*—then clearly it would be an unwarrantable exercise of power. But if it be levied for the purpose of furthering any public enterprise, or aiding any public undertaking whereby the community or public as such will be benefited, it would clearly be otherwise. And, generally, the Legislature is to decide upon the question as to whether the public welfare will be furthered by any particular enterprise or improvement. (18 Wend. 9.) "The Legislature is not," says the Court of Appeals of New York, "confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize cases founded in equity and justice in the largest sense of these words, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good." (*Town of Guilford v. The Supervisors of Chenango County*, 13 N. Y. R. 149.)

The full power of taxation must necessarily carry with it the right to determine the purposes for which it must be levied. So it is held that a tax must be upheld, unless it be levied for an object in which the community or public palpably have no interest, where it is perfectly apparent at first blush that it is imposed simply for the benefit of individuals. (*Cheaney v. Hooser*, 9 B. Monroe, 330; 21 Penn. S. R. 147.)

The question necessarily arises, then, whether the object for which this tax is levied is rather private than public; an enterprise not beneficial to the people of Ormsby County; or whether it is one of those public improvements whereby the County is directly benefited, and which is generally recognized as a proper object for public aid. It undoubtedly belongs to the latter class. A railroad is a public highway, affording facilities for easy and rapid travel to the public, and aiding in developing the resources of the country, and making markets for its productions easy of access. That private individuals are to own the road and receive the tolls in no wise impairs or diminishes these advantages to the public.

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The question for the Legislature to determine in such cases is simply whether the work when perfected will be of sufficient advantage to the public to warrant public aid being given to it; not whether the public are to receive all the benefits from it. Indeed, it has been held in every State in the Union, where a railroad has been built, that it is a public work, and as a consequence, the right to take private property against the will of the owner for the purpose of securing a way (paying a just compensation therefor) has, in every instance in which a railroad has been built in the United States, been granted.

If a railroad were not considered or held to be a public work, private property could not be so taken; for, as has already been stated, such property can only be taken for *public uses*, even where a compensation is paid. A railroad must, then, whenever the right to take private property is given to it, (which is doubtless invariably the case) be held to be a public work, and for the public benefit. And it must be borne in mind that there is no difference in this respect between a road built by private capital and owned by individuals, or one built by the public itself. This very question is fully and ably discussed in the case of *Beekman v. The Saratoga R. R. Co.*, (3 Paige, 45) by Chancellor Walworth, who said: "The right of eminent domain does not, however, imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. And if the Legislature should attempt thus to transfer the property of one individual to another, where there could be no pretense of benefit to the public by such exchange, it would probably be a violation of the contract by which the land was granted by the government to the individual, or to those under whom he claimed title, and repugnant to the Constitution of United States. But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of *eminent domain*, and to authorize an interference with the private rights of individuals for that purpose. (Kent's Com. 340.) It is upon this principle that

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the Legislatures of several of the States have authorized the condemnation of lands of individuals for mill sites, where from the nature of the country such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise.

“And according to the opinion of Chief Justice Marshall, in the case of *Wilson v. The Black Bird Creek Marsh Company*, (2 Peters, 251) measures calculated to produce such benefits to the public, though effected through the medium of a private incorporation, are undoubtedly within the powers reserved to the States, provided they do not come in collision with those of the General Government. It is objected, however, that a railroad differs from other public improvements, and particularly from turnpikes and canals, because travelers cannot use it with their own carriages, and farmers cannot transport their produce in their own vehicles; that the company in this case are under no obligations to accommodate the public with transportation, and that they are unlimited in the amount of tolls which they are authorized to take. If the making of a railroad will enable the traveler to go from one place to another without the expense of a carriage and horses, he derives a greater benefit from the improvement than if he was compelled to travel with his own conveyance over a turnpike road at the same expense. And if a mode of conveyance has been discovered by which the farmer can procure his produce to be transported to market at half the expense which it would cost him to carry it there with his own wagon and horses, there is no reason why the public should not enjoy the benefit of the discovery. And if any

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individual is so unreasonable as to refuse to have the railroad made through his lands, for a fair compensation, the Legislature may lawfully appropriate a portion of his property for this public benefit, or may authorize an individual or corporation thus to appropriate it, upon paying a just compensation to the owner of the land for the damage sustained. The objection that the corporation is under no legal obligation to transport produce or passengers upon the road, and at a reasonable expense, is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual or his property, without any reasonable excuse, upon being paid the usual rate of fare. The Legislature may also from time to time regulate the use of the franchise and limit the amount of toll which it shall be lawful to take, in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road." See also, *Bloodgood v. M. & H. R. R. Co.*, (18 Wend. 9).

That a railroad is a work in which the public are interested to the extent that a tax imposed in aid of it must be upheld, is a proposition upon which there is no diversity of authority whatever. (*Buffalo & N. Y. R. R. Co. v. Brainard*, 9 N. Y. 100; *C. W. & Z. R. R. Co. v. Clinton Co.*, 1 Ohio State R. 77; *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; *Thomas v. Leland et als.*, 24 Wend. 65; *Slack v. Maysville & Lexington R. R. Co.*, 13 B. Monroe, 1; *Talbot v. Dent*, 9 B. Monroe, 526; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; 9 Indiana, 74; 24 Barbour, 446.)

If money may be raised by means of taxation for such purpose, it will not be denied that bonds may be issued for the same purpose, to be paid by means of taxation. We conclude that the Legislature was fully authorized to direct the issuance of the bonds in question, and to levy a tax to meet their payment as is done in the law under consideration.

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The next question to be determined is whether the tax complained of was prematurely levied by the Commissioners. It is argued that no tax should be levied or assessed under this law until the bonds were issued, and as they could not be and were not issued until after the levy, the latter act was invalid. But there is nothing in the law prohibiting the Commissioners from levying a tax to meet the interest on the bonds before the issuance of them. The bonds, it is true, are not authorized to be issued until the completion of the road through the County of Ormsby; but suppose the Commissioners should be perfectly satisfied that they would be required to issue them shortly after the time for levying taxes, what authority is there in this act for the conclusion that they could not upon such belief levy the tax? If this could not be done the bonds might be issued and no money in the treasury to meet the first year's interest when it became due, which would be the case here were it held that no levy of taxes could be made until the bonds were issued, for it is clear no special levy can be made. Thus the tax provided by this law could not be levied until the next year, and so the interest for the first year would be unprovided. Now it is very certain the Legislature did not intend any such result. The principal and interest of these bonds are not different from any other county liability, which the Commissioners may anticipate by levying a tax before it becomes due, for the purpose of paying it. If the Commissioners were satisfied that the county would become liable to pay interest on these bonds before another tax could be levied and collected, what is there in the law prohibiting them from providing for it like any other anticipated liability? The interest on these bonds for the first year is as absolutely required to be paid as for any subsequent year. Are we to conclude that the Legislature has made this requirement and still prohibited the only means by which it may be accomplished? Certainly not. It is a rule of construction that when anything is required to be done, the usual means may be adopted for performing it.

So also it is always the first great object of the Courts in interpreting statutes, to place such construction upon them as will carry out the manifest purpose of the Legislature, and this has been done in opposition to the very words of an Act.

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Can there be any possible doubt that it was the intention of the Legislature in the adoption of the law in question, to require the payment of the first year's interest on the bonds as it became due? and if so, can it be claimed that it denied the Board of County Commissioners the power to carry out that intention? It seems to us not. The tax was therefore properly levied.

For the reasons here stated, we conclude the injunctions in both cases were unauthorized, and must be dissolved.

It is so ordered.

By the Court, JOHNSON, J.:

In this case the views of my associates, as presented in the opinion of the Chief Justice, command my unqualified approval, except in respect to the last point noticed in the opinion—the levy of the one per cent. interest tax: for my convictions lead me to the adverse conclusion for the reason that, as I interpret the law, it gave to this Board when the levy was made, on or about the seventeenth of April, 1869, no authority whatever to make the levy; and necessarily, the conclusion of the majority of the Court rests upon the converse of this proposition. In the Act concerning Boards of County Commissioners, (Stats. 1864–5, 258, Sec. 8) they are empowered “to levy, for the purposes prescribed by law, such amount of taxes on the assessed value of real and personal property in the county as may be authorized by law.” By section one, of the Supplemental Revenue Act of April 2d, 1867, they are authorized “to levy an *ad valorem* tax for county purposes, not exceeding the sum of one hundred and fifty cents on each one hundred dollars value of all taxable property in the county.” * * * Section two of the same Act authorizes and empowers such “Board of each county, annually, prior to the third Monday in April, unless otherwise provided by special Act, to levy and assess the amount of taxes that shall be levied for county purposes.” * * *

Thus we see that the *maximum* rate of taxation for county purposes, unless there be some special tax otherwise provided for, is fixed at one and a half per cent. upon the assessed value of the property; and within this limitation the levy must be made by the Board. This brings us to the Act of January 27th, 1869, author-

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izing the issuance of bonds to the Railroad Company, under which must be found, if at all, the authority of the Board to levy the additional tax of one per cent. The Act is fully set out in the leading opinion; and upon inspection, it will be seen that the donation of Ormsby County Bonds is upon conditions: That whenever, within eighteen months from the passage of this Act, the Virginia and Truckee Railroad Company * * shall have completed the construction of a first-class iron railroad between certain points in Ormsby County, and the same shall be in complete readiness to receive the rolling stock proper therefor, the Board of Commissioners of said county are authorized and directed to issue to said Railroad Company the bonds of such county, to the amount of two hundred thousand dollars—the principal thereof payable at stated periods, and bearing interest at the rate of seven per cent. per annum, semi-annually.

Section *three* provides the mode of procedure in determining whether the conditions assumed by the Railroad Company have been complied with; and “said Board, on being so satisfied, shall without delay, prepare, issue, and deliver the bonds.” In section *four* we reach the taxation clause, under which the Board assumed to act in making the levy in question: “The said Board of County Commissioners are hereby authorized and required to levy and collect annually, until all of said bonds issued under the provisions of this Act shall have been fully paid as provided for, a tax of one per cent. upon all taxable property of Ormsby County, to be applied exclusively to the payment of the principal and interest of said bonds to be issued as herein provided.” * * * Now it is conceded that when the levy of the tax was made, no bonds had been issued—nor could they be, as the road was but partially constructed. No debt of principal or interest was chargeable against the county, calling for the payment of interest. By what authority, then, could the Board proceed to levy the tax? Look at the words of the Act under which the levy is justified: Not “bonds which may be issued,” or which “are authorized to be issued;” but that this special tax “shall be levied and collected annually until said bonds *issued*,” etc., meaning thereby that whenever the bonds were issued, an annual tax should be levied and collected. This construction is in

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harmony with the tense of the word "issued," and is strictly in keeping with the conditions of the Act authorizing the donation: that bonds shall be issued and the property of the county subjected to taxation for the payment of the principal and interest, *whenever*, within eighteen months from the date of the Act, a given character of road shall have been constructed. I take it that if a different rule was intended, or if the time when this tax was first to be levied was to be in any degree discretionary with the Board or dependent upon its judgment as to when the bonds would probably be demandable, that then the Act would, as it does in the matter of the final acceptance of the road, have contained some evidence of such intention, which certainly it has not. Nor is there any analogy between this and the ordinary indebtedness of a county. It is well known, that the general fiscal concerns of the county are for the most part conducted without ready money. Debts are contracted, liabilities incurred, and warrants drawn upon its treasury, in anticipation of its revenues for the current year. The rates of taxation also are fixed by the Board of Commissioners, with regard to the probable expenditures as well as of receipts—all of which, however, has the direct sanction of law, and the authority cannot be questioned. Certainly, the cases are very unlike.

I have no doubt but that the Act in question was framed with the expectation that it would secure the payment of the interest on the bonds as it fell due, and if the levy made by the bonds should be held invalid, it doubtless would postpone the payment of the first, and perhaps the second installment of interest. But, in my judgment, with all possible deference to the ruling of my associates on this point, the Act admits of no construction that can uphold the levy.

From these views it follows, that upon the question of the levy of the tax my conclusions are, that it was without authority of law and void. Otherwise, I concur in the opinion of the Chief Justice.

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THE STATE OF NEVADA, RESPONDENT, v. JAMES WALSH,
APPELLANT.

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MURDER—THREATS—FAILURE TO CONNECT PROOF ADMITTED ON CONDITION. In a trial for murder, evidence being offered to prove that a half hour before the killing the defendant had said that “a d—d puppy had been talking about his wife, and he was going to put a stop to it,” was admitted against defendant’s objection, on the undertaking of the District Attorney to show by further testimony that the defendant referred to the deceased; but no such further proof being made, nor any ruling excluding the evidence, and the prisoner being convicted of murder in the first degree: *Held*, that the testimony under the circumstances was improper, was calculated to prejudice defendant, and in the absence of a proper instruction, was good cause for reversal of the judgment.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

The facts are stated in the opinion.

William Patterson, for Appellant.

H. Mayenbaum, for Respondent.

By the Court, JOHNSON, J.:

The defendant was indicted for murder in the killing of one Owen Murphy, tried and convicted for the crime in the first degree, and sentenced to death. A new trial was refused, and from such order, the judgment, and certain rulings of the Court below, this appeal is brought.

One of the alleged errors, and upon which we rest the judgment herein, is the admission of the testimony of one Joseph Beardsley, a witness for the State, against defendant’s objection. The grounds of the objection will appear from the record, as follows:

“Joseph Beardsley, sworn for the prosecution, said: ‘I know Walsh, but did not know Murphy; was there at Murphy’s cabin immediately after his decease. I saw Walsh about a half an hour before the killing of Murphy; saw him near the Manhattan Mill, as he was on his way home; he seemed to have been drinking considerably.’ Here defendant’s counsel demanded the object of the proof about to be offered, when the District Attorney stated that

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he proposed to show threats made against Murphy by Walsh, and although no name was mentioned, that he would show that Murphy was the person referred to by Walsh. The counsel for the defendant objected to the admission of the evidence, which objection was overruled by the Court upon the ground that the District Attorney proposed to connect the declaration of Walsh with Murphy. Defendant's counsel then and there excepted. Beardsley then proceeded: * * * 'Walsh said that a party had been talking about his wife, and he intended to put a stop to it. * * * He said he was in a hurry, and when asked by the witness why in such a hurry, his reply was that a party had talked about his wife, and he was going to put a stop to it. * * * There is a d—d puppy up here who has been talking about my wife, and I am going to put a stop to it.' This was his language."

These declarations, detailed by the witness, were manifestly irrelevant unless connected with Murphy, and to meet the objection, the District Attorney stated that he would establish by other evidence the fact that Murphy was the person referred to by the defendant in his conversation with the witness. With the understanding that such evidence would be forthcoming in the course of the trial, the Court admitted these declarations in evidence. But, as it appears, the prosecution did not make good the condition upon which the evidence was allowed, for no additional or connecting proofs were adduced, and the case was left with the jury without an instruction that the evidence upon that point should be disregarded—hence, it is claimed that defendant should have been granted a new trial.

Perhaps the expressions testified to by Beardsley are of themselves somewhat vague and uncertain, and convey no positive meaning of intended bodily injury; yet, from the nature of the crime charged upon defendant, and circumstances developed on the trial, this testimony could not fail to prejudice the cause of the accused in the minds of the jurors. Indeed, it seems to us highly probable that this evidence had material influence with the jury, in fixing the degree of guilt.

The Court below, as we have shown, not having instructed the jury to disregard the evidence of Beardsley, it is not a question here whether such an instruction would have been sufficient; but

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it is very certain that the absence of such direction was sufficient cause to entitle defendant to a new trial; and upon this ground the judgment is reversed, and the cause remanded for further proceedings.

THE STATE OF NEVADA v. THE BOARD OF COUNTY COMMISSIONERS OF WASHOE COUNTY.

CERTIORARI—PROVINCE OF THE WRIT. The province of the writ of certiorari extends only to the question of jurisdictional power.

BOARD OF EQUALIZATION OF SPECIAL AND LIMITED JURISDICTION. The Board of Equalization is of special and limited jurisdiction, and its record must show affirmatively the necessary jurisdictional facts.

EQUALIZATION—REDUCTION OF ASSESSMENTS. Under the Revenue Act of 1866 (Stats. of 1866, 168, Sec. 15) the Board of Equalization has no power to reduce an assessment when the person complaining has refused to give the assessor a statement under oath of his property.

SWORN STATEMENT OF RAILROAD COMPANIES. Under the Revenue Act of 1869, (Stats. 1869, 184) the sworn statement as to the property of railroads, to be given to assessor for assessment purposes, must show affirmatively that the person making it is one of the persons named in the statute, and be subscribed by him.

FAILURE TO MAKE SWORN STATEMENT. The punishment prescribed for failure of a railroad company to make a sworn statement, as required by the Revenue Act of 1869, (Stats. 1869, 184, Sec. 3) is in addition to the penalty of exclusion from the benefits of equalization.

DEMAND FOR SWORN STATEMENT—BURDEN OF PROOF. Where a revenue Act provided that a sworn statement of the property of a railroad should be furnished on demand of the assessor, otherwise it should be deprived of the benefits of equalization; and, no proper statement being made, it was claimed by the railroad company that it did not appear that there had been any demand: *Held*, that the burden of proof was upon the railroad company desiring equalization to show the fact of neglect to make the demand.

CERTIORARI from the Supreme Court to the Board of County Commissioners of Washoe County, sitting as the Board of Equalization of that county.

The valuation of the property of the Central Pacific Railroad Company in Washoe County, made September 9th, 1869, by William Thompson, County Assessor, was one million, two hundred and

5	317
6	92
7	25
2	25
9	85
9	307
12	19
12	31
12	169
12	183
12	222
5	317
21	17
21	176
23	800
26	226
5	317
23	283
5	317
26	124

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three thousand, one hundred and thirty-nine dollars. The statement of John Corning fixed it at four hundred and seventy-five thousand, two hundred and eighty-two dollars and fifteen cents. The Board of Equalization reduced it to six hundred and fifty-six thousand three hundred and eighty-nine dollars. It was at the instance and upon the affidavit of William Thompson that the writ was issued.

By the Court, WHITMAN, J.:

On the first of October last the Board of County Commissioners of Washoe County, sitting and acting as a Board of Equalization, reduced the assessment for the present fiscal year of the Central Pacific Railroad Company of California, a corporation having a certain portion of its road and property in this State and the County aforesaid. Application being made to this Court for a writ of certiorari, the same was issued, and thereupon certain papers and minutes have been certified up, upon which decision is to be made.

No dispute exists between the contesting parties as to the office of the writ, and as that has been heretofore decided in this Court, (*Maynard v. Railey*, 2 Nev. 313) suffice it to say, that its province extends only to the question whether the Board acted within its jurisdictional powers. To settle that question, of course it is proper to review any or all evidence certified. (*Whitney v. The Board of Fire Delegates*, 14 Cal. 479.)

The grant of power to the Board will be found in the "Act to further amend an Act entitled an Act to provide Revenue for the support of the Government of the State of Nevada," approved March 1st, 1866, section fifteen, as follows: "The Board of Equalization shall have power to determine all complaints made in regard to the assessed value of any property, and may change and correct any valuation, either by adding thereto or deducting therefrom, if they deem the sum fixed in the assessment roll either above or below its true value, whether said sum was fixed by the owner or assessor, except that in case where the person complaining of the assessment has refused to give the assessor his list under oath,

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as required under this Act, no reduction shall be made by the Board of Equalization in the assessment made by the assessor."

The Board is, in this matter of equalization, of special and limited jurisdiction, and nothing in that regard is to be presumed in its favor. Its record must show affirmatively the necessary jurisdictional facts, else the inference is adverse. (*Whitney v. The Board of Fire Delegates*, 14 Cal. 479; *Finch v. Tehama County*, 29 Cal. 453; *Plummer v. Waterville*, 32 Maine, 566; *Rhode v. Davis*, 2 Ind. [Carter] 53.; *City of Lowell v. The County Comms. of Middlesex*, 3 Allen, 550.)

The record in this case discloses a paper purporting to be a statement from the railroad company, with this affidavit:

"STATE OF NEVADA, }
County of Washoe. }

"John Corning, of the Central Pacific Railroad Company, being duly sworn, says: That the annexed statement contains a full, true, particular, and correct account of all the taxable property, and its true valuation, belonging to, or in the custody, or under the control of said railroad company, within the County of Washoe, State of Nevada, and that the statement here made as to the number of miles of said railroad within the State of Nevada, and the amount and value of the rolling stock used in the State of Nevada, is full, true, and correct.

"Subscribed and sworn to before me this seventeenth day of August, A.D. 1869.

"J. R. LOVEJOY,
"J. P., Verdi Township."

This paper is certified as being "a full, true, and correct copy of the original statement of property made by the said company and returned to the Assessor of Washoe County, Nevada, as used in evidence before the Board of Equalization in the matter of equalizing said company's taxes."

A statute of this State entitled "An Act supplementary to an Act entitled an Act to provide Revenue for the Support of the Government of the State of Nevada, approved March 9th, 1865, and

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the Acts amendatory thereof," approved March 6th, 1869, provides in its first section thus :

Section 1. "In all cases where a railroad is located and is being or has been constructed in or through two or more of the counties of this State, the President, Secretary, General Superintendent, or Managing Agent of the corporation, company, or persons owning the same, or some Managing Agent thereof within the county, shall, within a reasonable time after demand by the County Assessor of any county in or through which said road is being or has been constructed, furnish to said Assessor a statement under oath or affirmation, which shall be in writing, duly subscribed and sworn to before some officer within the State authorized by law to administer oaths setting forth * * *."

The paper offered fails to comply with the statute in several important particulars: 1st. It does not show that the party making the affidavit was one of the persons made competent to render the statement by statute. It should affirmatively appear that he is such person, and he should also swear to the fact. (*Lindsay v. Sherman*, 5 How. Pr. R. 308; *Ex parte Bank of Monroe*, 7 Hill, 177; *Cunningham v. Goelet*, 4 Den. 71; *People v. Perrin*, 1 How. Pr. R. 75; *Hill v. Hoover*, 5 Wis. 354.) 2d. The affidavit is not subscribed. Upon this point the statute is peremptory. The language of the original and amendatory Acts differs from that of the supplemental above quoted, touching the statement and affidavit. They provide that the Assessor "shall demand * * * a statement under oath or affirmation." These do not provide, save inferentially, for a written statement; nor do they require a subscription. Thereunder, perhaps, it would be sufficient to make an oral statement under oath or affirmation; and if the affidavit be written, it need not necessarily be subscribed; (*Jackson v. Virgil*, 3 Johns, 540; *Millius v. Shafer*, 3 Denio, 60; *Ede v. Johnson*, 15 Cal. 53); but otherwise under the supplemental Act. Therein, subscription is required; why, is not for this Court to inquire; but from the fact that the additional provision is made, it follows that it was deemed proper or necessary by the Legislature; and at all events, being required, it must be done, else the statement does not conform to the statute. (*Stone v. Marvel*, 45 N. H. 481; *Porter v.*

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Com's of Norfolk, 5 Gray, 365 ; *Otis Co. v. Inhabitants of Ware*, 8 Gray, 509.)

It is claimed on behalf of the Board, that as the supplemental Act provides a punishment for non-compliance with the requirements of section one above quoted, therefore the further penalty of exclusion from the benefits of equalization should not and cannot be imposed.

This is the provision of the Act referred to :

Sec. 3. "If any corporation, company, or persons owning such railroad fail, neglect or refuse, after being notified, to furnish a statement for assessment and taxation as provided in this Act, the County Assessor may proceed to make the assessments in the same manner as in other cases, as provided in the Act to which this Act is supplementary ; and any person upon whom a demand is made for a statement, as in this Act provided, failing, neglecting, or refusing to furnish the statement as required, without legal excuse, shall be subject to the same punishment as in other cases of such failure, neglect or refusal, as provided in the Act aforesaid."

A review of all the Acts will show, however, that a distinction is and should be made between punishment to the offending party and the power of the Board. The punishment referred to is prescribed in section six of the Act of 1866, to which the Act of 1869 is supplemental. It is probable that the punishment would have followed without the provisions of section three of the Act last named ; that may be considered the result of excessive caution.

The grant of power to the Board is contained in section fifteen of the Act of 1866, treating of other and different matter than that of section six. The two Acts are to be read together, one being supplemental to the other, and section fifteen applies to the Act as a whole ; otherwise, there is no power to equalize the assessments of railroad companies, as the only grant of power of equalization is to be found in the section referred to, and thereby the Board is explicitly deprived of power to reduce the assessment of a party refusing "to give the Assessor his list under oath, as required under this Act." What Act ? Why, the Act as a whole. The list to be given in one way by certain parties named ; in another, by rail-

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road companies, whose form and requirements of list are prescribed in the Act of 1869.

It is further claimed that there is no proof that the Assessor ever demanded a statement of the party in question, and therefore it cannot be said that there was a refusal to render one, and that unless there was such refusal, the Board had jurisdiction. Aside from the general proposition that the officer must in this and similar instances be presumed to have done his duty until the contrary appears, (*Hartwell v. Root*, 19 John. 345) the burden of proof is upon the party desiring relief from the Board, to show the fact of the officer's neglect. (*Winnisimmet Co. v. Assessor Town of Chelsea*, 6 Cush. 477.)

That the Central Pacific Railroad Company so understood the law, is evident from the offer of the paper heretofore referred to in evidence. This is claimed as a substantial compliance with the statute; perhaps under some circumstances it might be, but as this is a jurisdictional question of power, neither this Court nor the Board of Equalization of Washoe County can deem any compliance substantial, save one literal.

The statute is plain and simple in its requirements. While it should not be so construed as to entrap the unwary, on the other hand its positive provisions cannot be frittered away by judicial interpretation. The Company failed to show the making of the statutory statement. Failure to make such is a refusal, under the statute. In such case, the Board of Equalization had no jurisdiction of the case upon complaint of undue assessment, and no right to reduce; and in attempting so to do, exceeded its powers.

It is therefore ordered and adjudged, that all the proceedings had by the Board of Equalization of Washoe County, State of Nevada, touching the reduction of the assessment of the Central Pacific Railroad Company of California, for the fiscal year 1869, be, and the same are hereby annulled.

Let judgment be entered accordingly.

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THE STATE OF NEVADA EX REL. S. W. MCGUIRE,
RESPONDENT, v. THOMAS A. WATERMAN, APPELLANT.5 388
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MANDAMUS—REVIEW OF ACTION OF REGISTRY AGENTS. Under sections six and eight of the Registry Law, (Stats. 1869, 140) the functions of the writ of mandamus are enlarged so as to allow a hearing of evidence, and an enforcement by such writ of the proper registration of an elector, or the erasure of a name improperly registered: being in effect a review of judicial or discretionary action of the Registry Agent.

MANDAMUS NOT ISSUED WHEN FRUITLESS. A mandamus will not issue to require the performance of a duty, unless it appear that the defendant has it in his power to perform the duty required.

ELKO COUNTY REGISTRATION. Where the Act to create Elko County (Stats. 1869, 153) required certain Registry Agents to register the names of electors before June 21st, 1869; and after that date a mandamus was issued to compel one of them to erase names improperly registered: *Held*, that the Registry Agent was *functus officio*; that the writ consequently could not be complied with, and that it was therefore improperly issued.

• **APPEAL** from the District Court of the Sixth Judicial District, Lander County.

Earl & Smith, for Appellant.

I. To authorize the issuance of mandamus, it must appear that defendant yet has it in his power to perform the duty required of him. (12 Barb. 217; 15 Barb. 607; 24 Barb. 166; 11 How. Pr. 89; 7 Abb. Pr. 34.)

II. The writ will not issue where it would be unavailing from want of power in the defendant to comply. (12 Barb. 217; 15 Barb. 607; 24 Barb. 166; 11 How. Pr. 89; 18 How. Pr. 305; 4 Abb. Pr. 84; 28 Cal. 429.)

III. The writ will not be allowed in cases where corporations and ministerial and other officers have acted judicially, nor where they have a discretion with regard to the performance of an act. (1 Den. 617; 12 Barb. 446; 15 Barb. 608; 22 Barb. 114; 39 Barb. 651; 12 Johns. 414; 19 John. 259; 9 Wend. 508; 1 Hill, 362; 4 Cal. 177; 10 Cal. 376; 22 Cal. 34.)

IV. The writ will not lie to a Court acting under a special commission which has expired by its own limitation previous to the

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application for the writ. (20 Wend. 108 ; Stats. 1869, 153, Secs. 3-5.)

V. The alternative writ was not served till June 22d, 1869, twenty-two days after the date in which defendant is required by law to certify the registry list to the County Commissioners, and one day after the election held under the Act of the Legislature organizing the County of Elko. The order for the peremptory writ was made August 10th, 1869, fifty days after the organization of the County of Elko, and thirty-four days after the county and township officers had entered upon their official duties. The writ therefore will not lie: First, because it is not in the power of defendant to comply; second, because it would be unavailing from want of power in defendant to comply.

H. Mayenbaum, for Respondent.

By the Court, JOHNSON, J.:

The controversy in this case grows out of certain proceedings had under "An Act to Create the County of Elko, and to Provide for the Organization thereof," approved March 5th, 1869, (Stats. 1869, 153) wherein the immediate organization of said county was conditional upon there being registered more than one thousand legal voters therein, previous to the twentieth of May, 1869. It appears that Thomas A. Waterman was duly appointed and qualified as one of the Registry Agents, authorized by section three of said Act; and that within the periods prescribed therein, he registered the names of four hundred and twenty-six persons, as qualified to vote in such County of Elko.

On the nineteenth of June, 1869, Maguire, the relator herein, presented his petition, under oath, to said District Court, in which among other averments it is alleged that "he, the petitioner, is a qualified elector of said county; that of the several persons registered by Waterman, as Registry Agent aforesaid, Reuben S. Dickerson and one hundred and twenty-four others, (whose names are stated) are not legal or qualified voters, nor entitled to be so registered; and that said Registry Agent registered the names of said persons in fraud of the Act before cited; that on the sixteenth of

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June, 1869, he duly filed with said Registry Agent, affidavits in writing—that is to say, one affidavit for each of said persons so illegally registered—which affidavits set forth, that said S. W. McGuire is a qualified elector of said county; that said persons, or either of them, or any of them, never were nor are they now, nor will they ever be, on the said twenty-first day of June, 1869, citizens of the United States and the State of Nevada. That they, or either, or any of them, will not on said day have actually resided in said State six months next preceding said day; that they, and each of them, left the said County of Elko and State of Nevada, with the purpose of remaining absent therefrom; that the said affiant then and there objected in writing to the right to vote and the registration of said persons and each of them; and that he then and there, challenged each of them on the said grounds, and demanded of said Registry Agent to issue a notice or notices to each of said persons to appear and answer said objections according to law, and the questions put to them by the said Registry Agent; and that each of them be stricken from said registry; and this affiant then and there demanded of said Registry Agent to issue and sign a notice to each of said persons, notifying them to appear before him, the said agent, at his said office, at the time therein to be specified by said agent, then and there to answer under oath such questions as may be propounded to each of them, touching their qualifications as electors.

“That the said Registry Agent then and there neglected and refused, and ever since has neglected and refused, and still neglects and refuses, to issue such notices, with the intent to deprive this affiant of his right to challenge said illegally-registered persons, and with the intent to force the organization of said county by illegal voters, and in fraud of said Act. * * * That without said persons so illegally registered, there are not one thousand persons registered in said County of Elko. Wherefore, this affiant prays that an alternative writ of mandamus issue to compel said Registry Agent to issue such notices, and to erase from said registry the names of said persons immediately after service of such writ, or show cause before said Court why he has not done so.” Thereupon, the Court issued the writ in conformity with the prayer of petitioner,

making the same returnable on the thirtieth—service of which was had on the twenty-second of said month. Waterman made his showing by way of answer; also, moved to discharge the writ upon several grounds; but from the view we take of these proceedings, it is unnecessary to pursue its history further, than to state that on the tenth of August, after the trial and determination of certain issues of fact by a jury, the Court awarded judgment that a peremptory writ of mandate be issued to said Waterman, as Registry Agent, requiring and compelling him to erase forthwith from said registry the names of the persons aforesaid, to wit: Reuben S. Dickerson, and the one hundred and twenty-four others named in said petition; and from said judgment Waterman brings his appeal upon the judgment roll alone.

Under sections six and eight of the "Act to Provide for the Registration of the Names of Electors, and to prevent Frauds at Elections," (Stats. 1869, 140) the extent of the power of District Courts and Judges thereof to inquire into and determine, by means of the writ of mandamus, the right of registration, is in one particular enlarged beyond the ordinary functions of such writ as understood at common law, and under our general statutes—in this, that it authorizes the Court or Judge to hear the evidence and enforce, by peremptory writ, the proper registration of an elector, or to erase from the registered list of electors the name of any person therein registered—which is, in effect, a review of matters wherein the Registry Agent has acted *judicially* and *discretionally* in granting or refusing the application. But otherwise, in all essential respects, the writ and proceedings under it stand unaffected by the Act in question, and must be governed by those general principles and rules applicable thereto. Among them are: 1st. To authorize the issuance of the writ of mandamus, the act required to be performed must be a duty resulting from the office, and enjoined by law. (Prac. Act, title *Mandamus*.) 2d. It must appear that defendant yet has it in his power to perform the duty required of him; and the writ will be refused if it be manifest that it would be vain and fruitless, or cannot have a beneficial effect. (Tapping on Mandamus, 17; *People v. Supervisors of Greene*, 12 Wend. 217; *People v. Supervisors of Westchester*, 15 Wend. 607; *Colo-*

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nial Life Ass. Co. v. Board of Supervisors, New York, 24 Wend. 166.)

The Act creating the County of Elko, in section three provides that the Registry Agents appointed by the Board of County Commissioners shall have power and authority, and it shall be their duty, previous to the twentieth day of May, 1869, to register all the legal voters properly entitled to be registered within their districts or precincts, offering to do so. Such registration shall be conducted in all respects under the provisions of the registry laws of this State. Each of said Registry Agents shall, prior to the first of June, 1869, certify to said Board of County Commissioners the number of voters by each registered; also the registry lists from which the certificate is made, or a copy thereof." It is furthermore provided in said Act, section four, that "if it shall appear from the certificates of the Registry Agents, supported by an examination of the registry lists, (or a copy thereof) that more than one thousand voters have been registered within the county, such fact shall be properly noted, or entered on the minutes of the proceedings of said Board, and the Board shall make an order for the organization of the county, by an election of county and township officers. * * * If it appears that the number of registered voters is less than one thousand, the election for county officers shall be held on the day of the general election, in the year A.D. 1870, * * * *provided*, the special election herein provided for, (which under section five, is fixed for the third Monday of June, 1869, being the twenty-first day of the month) if held, shall be so held under the registration herein provided for. A new registration shall be made for the election in the year 1870." * * Section eight of the Registration Act before cited further defines the duties of the Registry Agents, and among others therein enumerated, they are required to hear and determine objections made in a given way, to any person registered and notified of such objections, "until six o'clock P.M. on the fourth day previous to the day of election." But in respect to any and all of the questions arising upon matters stated in the petition, concerning the duty of such Registry Agents, they are subordinate to, and must follow the determination of the leading and principal question raised by this

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appeal. Was it a duty resulting from his office as Registry Agent and within the power of Waterman to comply with the mandate of the District Court of August 10th, to erase the names of the persons named from such registry-roll? It has been shown that the creation of the office and the duties imposed upon the Registry Agents was for a special purpose, having reference to the organization of the county, and the special election of the twenty-first of June. No other election was authorized or could possibly occur until the general election in 1870, and then, as we have shown by the law, it was subject to a new registration, with which these officers under their original appointment could have no duties to perform. Thus it is seen, that the authority and correspondingly the duty of the Registry Agent was covered by a special commission which at furthest could not extend beyond the day appointed for the special election, the twenty-first of June. As before stated, the alternative writ was served on the twenty-second of June, the day following the appointed time of such election, whilst the mandatory writ was not directed to issue until the tenth of August, when such Registry Agent, even at the earliest of these dates, was *functus officio*. The writ will not be granted in such a case. (*The People v. Monroe*, Oyer and Terminer, 20 Wend. 108.)

Although the matters stated in the petition may show a disregard of official duty by such Registry Agent, yet it was beyond his power to correct his action or in fact to act in any way as a Registry Agent when the first writ was served; much less at the later time when a peremptory writ was ordered. The acts we have cited furnished a sufficient reply to the petition, and inquiry need have extended no further to show that the commands of the later writ could not be complied with, for he was no longer an officer under the law, and that "its issuance would," in the language of the authorities herein cited, "be vain and fruitless, and could have no beneficial effect." Hence we conclude that the Court below erred in allowing the peremptory writ, and therefore it is ordered that such judgment be reversed, with directions to dismiss the petition.

O'Neale v. McClinton.

THE STATE OF NEVADA EX REL. WILLIAM T. O'NEALE
v. J. G. McCLINTON.5 325
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INSANITY OF DISTRICT JUDGE. Where a District Judge was pronounced insane and sent to an insane asylum under the provisions of the statute for the care of insane persons, (Stats. 1869, 104) and upon a certificate thereof, the Governor appointed another person to fill his office as in case of a vacancy: *Held*, that the office was not vacant, and that the appointment of another Judge was void.

STATUTE CONCERNING INSANE PERSONS—VACANCY IN OFFICE. The finding and declaration of an incumbent of the office of District Judge to be insane, in accordance with the provisions of the statute for the care of the insane (Stats. 1869, 104) does not create a vacancy in his office.

CONSTITUTIONAL CONSTRUCTION—REMOVAL OF JUDGES FROM OFFICE. As the Constitution (Art. VII, Sec. 3) provides for the removal from office of Judges in a certain manner by the Legislature, such provision is exclusive and prohibitory upon the Legislature of other means for such removal.

OFFICE, HOW VACATED. An office presently filled cannot become vacant without a removal either voluntary or involuntary; when voluntary, no judicial determination resulting in vacation is necessary; when involuntary, such determination is essential, unless otherwise provided by the Constitution or laws in pursuance thereof.

ARGUMENT OF INCONVENIENCE. The argument of inconvenience can have no weight in the construction of a law; or at most, only in the case of a very doubtful point.

This was an original proceeding in the Supreme Court in the nature of *quo warranto* to inquire into the right of the defendant to hold the office of District Judge of the Eighth Judicial District. It appeared that on May 27th, 1869, Judge Chase was taken before Judge Wright of the Second Judicial District, declared to be insane, and in accordance with the statute ordered to be conveyed to the Insane Asylum at Stockton, in California. The testimony of the physicians on the inquest showed that he was monomaniacal and belligerent; subject to sudden paroxysms of passion, and disposed to quarrel with his friends; that there was no permanent hallucination; that he had rational intervals, but that his disease was increasing.

Mesick & Seely, for Relator.

I. When the office of District Judge is once filled, it can only

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become vacant in one of three ways: First, by the death of the incumbent; second, by the resignation of the incumbent; or, third, by the removal of the incumbent from the office by competent authority. It is admitted that S. H. Chase was duly elected Judge at the November election in 1866, and unless the office has since become vacant, (the term of office being four years) Chase is still Judge, and the defendant is a usurper. Chase has neither died nor resigned his office, and consequently is Judge, unless he has been removed from office; and he has not been removed, because the Legislature has not acted in the premises, and no other authority has power to remove a District Judge. (Const., Art. VIII, Secs. 3 and 4.)

II. The statute of 1866 (Stats. 1866, 237, Sec. 35) does not necessarily include the office of District Judge, and was probably passed in pursuance of the requirements of section four, article eight, of the Constitution, in order to provide for the removal of civil officers other than Judge, etc. But if the office of District Judge is included within said section thirty-five, to that extent the section is void under the Constitution.

III. If section thirty-five does include the office of District Judge, and it be valid, Judge Chase has never been found, upon a commission of lunacy issued to determine the fact, to be a confirmed insane person, or confirmed lunatic. The proceedings had to ascertain his mental condition were not upon such a commission of lunacy as is required by the section referred to, nor a commission of lunacy at all in any legal sense. (2 Barb. Chan. Practice, 226 and 242, Sec. 3.) The commission was not issued by any Court, nor were the proceedings which were had in the premises had in Court, nor entered of record in Court, but were *ex parte*, and had at the Judge's chambers. Besides, Judge Chase was not found to be a confirmed lunatic; on the contrary, he was found to be temporarily and curably insane. The proceedings were had under the provisions of the Act of 1869, passed to provide for the curing of persons temporarily insane. Confirmed lunatics are excluded from the benefit of that Act.

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Wells, Seawell & Boring, for Respondent.

I. It is contended that the mode pointed out in article eight, section three, of the Constitution, is the only constitutional mode of ousting from office a District Judge. We would hazard nothing, were we to admit the proposition to be true and logical. Removal from office is one thing; what act, omission, or event shall render an office vacant, is another and quite a different thing. While it may be true that one judicial tribunal cannot, by proceedings instituted, remove a Judge, it is certainly true that when an act has been done, or an omission has been made, or an event has occurred which, *per se*, vacates the office, a Court or Judge, as the facts and nature of the case may justify and require, may judicially declare that the act was done, the omission made, or the event had transpired, which rendered the office vacant, and that "thereby the office became and is vacant." That would not be removing the incumbent, for he would not be, *de jure*, an incumbent, after the doing of the act, making of the omission, or happening of the event, vacative in its operation and result.

The spirit of the constitutional provision relied on does not contemplate cases of insanity. The cases then and there sought to be provided for were those in which the will and willfulness of incumbents would necessarily have to be met and dealt with. When a man is insane, he is, so far as the discharge of official, even the ordinary, duties of life are concerned, legally *dead*: not so, when from long protracted debility one fails to perform the functions of an office—a case clearly contemplated in the adoption, after much debate, of the fundamental provisions referred to.

II. What is "confirmed insanity," in contemplation of the statute of 1866, 237, Sec. 35? Permanent, incurable, or life-long insanity could not have been meant; otherwise, why not so have expressed it? If meant, how would the fact ever be ascertained and judicially determined? Few, if any, even of the best skilled and profoundest physicians, would run the hazard of swearing that, as a fact, a man was insane and would never, in any event, under any circumstances, be cured, or recover from it. A man may, as

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we understand our language, be *confirmedly* insane, and still not be *permanently* so for lifetime, absolutely incurable and irrecoverable. A man may have confirmed insanity, as he may have confirmed cholera, small-pox, or fever, and be cured or recover. Evidently, the fact intended to be arrived at, as contemplated in the statute, is: "Is the incumbent incapacitated, by reason of fixed or settled insanity, to perform the functions of the office?" The rights of incumbents do not alone govern in such cases—those of the public must be observed and preserved as well.

III. Was Judge Chase found to be insane by a "commission of lunacy," as contemplated by the statute? It is contended that the commission of lunacy contemplated is a common-law commission of lunacy. We think not. But if prior to the statute of 1869 such a commission would have been requisite, it would not now, as that statute prescribes the mode of ascertaining and adjudging insanity. Clearly, a commission of lunacy being provided for in the last named statute, it supersedes the common-law commission, and is effectual, inasmuch as it requires witnesses, inquest, and judgment.

IV. Judge Chase has been, in the mode established and defined by the law of the State, judicially declared insane; and under that law, his insanity was found not to be of a harmless character; on the contrary, so confirmed and dire as to render him unsafe and dangerous to be at large, and requiring, in the opinion of the inquirers and the judgment of the Judge, his confinement in an insane asylum. He could not have been committed to, or received in, that asylum upon an examination under a common-law commission of lunacy, or in any other way examined and committed, save in the mode in which he was—the statutory mode. That examination, and judgment, and commitment, rendered the fact of his insanity *res adjudicata*. No good end could then be attained by a reëxamination and readjudication of the same fact, under a common-law commission—it is not contemplated by any law, and would be labor in vain.

By the Court, WHITMAN, J. :

This proceeding is in the nature of *quo warranto*, informing that

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defendant has entered into and usurped the office of District Judge of the Eighth Judicial District of the State of Nevada, and praying his exclusion therefrom.

It appears from the pleadings and evidence that S. H. Chase was duly elected to fill said office for a term ending with the first Monday of January, 1870. That on the twenty-seventh of May, 1869, said Chase was under certain statutory proceedings declared insane, and sent to the Insane Asylum at Stockton, California, as by such statute provided; and that upon certificate of such action the Governor of the State, deeming the office vacant therefor, on the fourteenth day of July, 1869, issued a commission to defendant, who thereunder qualified in legal form, and has since been, and is now, acting as such Judge. The sole question in the case is, whether there was a vacancy to be filled—all the proceedings had being admitted to be formally correct.

The Act followed is entitled "An Act to provide for the care of the Insane of the State of Nevada, and to create a Fund for that purpose." (Stats. 1869, 104.) The title and text of the statute correspond, and the former fully indicates the entire purpose and object of the latter, which was not intended to result, in any event, in a judicial determination creating a vacancy in any office. Had, however, this been its intention or result it would, as applied to judicial officers, be void, because clearly repugnant to the Constitution of this State. That provides, touching such, thus: Art. VII, Sec. 3—"For any reasonable cause, to be entered on the journals of each house, which may or may not be sufficient grounds for impeachment, the Chief Justice and Associate Justices of the Supreme Court, and Judges of the District Courts, shall be removed from office on the vote of two-thirds of the members elected to each branch of the Legislature; and the Justice or Judge complained of shall be served with a copy of the complaint against him, and shall have an opportunity of being heard in person or by counsel in his defense: *provided*, that no member of either branch of the Legislature shall be eligible to fill the vacancy occasioned by such removal.

Sec. 4. "Provision shall be made by law for the removal from office of any civil officer other than those in this article previously

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specified, for malfeasance or nonfeasance in the performance of his duties."

Such, or similar provisions, at the time of their adoption by the Constitutional Convention of Nevada, were neither new nor singular, having been theretofore incorporated in the Constitutions of many States of this Union. That there is a lack of judicial interpretation of, or decision upon their meaning or effect, must be attributed to the fact that the same is clear and evident. When called in question, however, they have been held to be exclusive and prohibitory upon the Legislature against the employment of other means for the removal of officers within their purview.

An office presently filled cannot become or be vacant without a removal, either voluntary or involuntary. When voluntary, no judicial determination resulting in vacation is necessary; when involuntary, such determination is essential, unless otherwise provided by the Constitution or laws in pursuance thereof; and in all cases is of that nature by whatever body performed. (*Page v. Hardin*, 8 B. M. 648.)

In the case of *Lowe v. Commonwealth*, considering a statute providing for the suspension from office of a county jailer, claimed to be unconstitutional because the Constitution had provided that such officer, with others named, should "be subject to indictment or presentment for malfeasance or nonfeasance in office," conviction to vacate the office, the Court, by Chief Justice Stiles, says: "But the question yet remains to be decided whether the Legislature can prescribe any other mode of removing such officers from office than those furnished by the Constitution, or enact a law whereby such officers may be suspended from a performance of the duties of their respective offices, and deprived of the emoluments of the same, which suspension—so far as the officer is concerned—would be certainly tantamount to a removal. It seems to us that there can be but one view of this question, which is, that wherever the Constitution has created an office and fixed its term, and has also declared upon what grounds, and in what mode, an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the Legislature to remove such officer, or suspend him from office for any other reason or in any other mode

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than the Constitution itself has furnished. To recognize the existence of such power would be, in effect, to say that these provisions of the organic law of the land are subject to legislative caprice, and to that extent, to defeat and violate the restrictions and safeguards which were inserted in the Constitution in order to give it permanence and stability. The results of such a doctrine might be pernicious in the extreme.

“The Governor’s term of office is fixed by the Constitution. That instrument likewise provides how he may be impeached and removed, and declares that all impeachments shall be tried by the Senate. Would it be seriously contended that the Legislature could, by enactment, subject him to trial for official misconduct in any other mode—as by indictment or presentment in a Circuit Court—and declare that, upon a conviction thus had, his office should be deemed vacant, or that he should be suspended from a discharge of his official duties? And yet such legislation would be valid if that department of the government can, at its option, change the provisions of the Constitution in reference to the mode of proceeding against the Governor, or any officer whose office is created by that instrument. Or suppose the Legislature should attempt by enactment to empower this Court, whenever in its judgment the public interests demanded it, to suspend any State officer whose term of office is fixed by the Constitution, and who is subject to impeachment, from the performance of his official duties for such period as the Court might deem proper; would such enactment be regarded as constitutional? Most certainly not. And yet the reverse would be true if the power in question really existed. In our opinion, the fact that the framers of the Constitution inserted in that instrument the several provisions fixing the terms of the offices thereby created, and prescribing the grounds upon which and the modes whereby the incumbents of such offices may be removed, is altogether sufficient to warrant the conclusion that those subjects were fully considered by them, and that they intended by embodying said provisions in the Constitution to make them permanent and fixed, and thus to place the subjects to which they relate altogether beyond legislative control. (*Lowe v. Commonwealth*, 3 Met. Ky. 237.) How applicable the reasoning of the citation to

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the case at bar. See also, as generally touching this matter, *Page v. Hardin*, (8 B. M. 648); *People ex rel. Ballou v. Dubois*, (23 Ill. 547).

A reference to the debates of the convention framing the Constitution of this State, will show that the provisions herein referred to were maturely considered, and the consequent inference arises that they were understandingly adopted.

The argument of inconvenience urged against the view taken by the Court of the Constitution, can have no weight; at most it could only affect a doubtful point, and in every such instance it is the duty of the Court to sustain the statute in immediate question. This is not a case for doubt; the Constitution is clear and explicit. During the term of office of Judge Chase there could be no vacancy, except upon his voluntary or involuntary removal therefrom. He has not voluntarily removed himself, nor has he been removed as the Constitution commands; therefore there is no vacancy, and was none for the Executive to fill. So the commission issued to the defendant was and is null, and the prayer of the relator must be granted, and judgment of ouster with costs be rendered against J. G. McClinton, defendant herein.

It is so ordered.

By LEWIS, C. J. :

Although not concurring in the opinion of Mr. Justice Whitman respecting the constitutional question discussed by him, I have nevertheless arrived at the same ultimate conclusion upon another view of the case.

The statute (Stats. 1866, 237, Sec. 35) declares that "every office shall become vacant upon the occurring of either of the following events before the expiration of the term of office," among which is "the confirmed insanity of the incumbent found upon a commission of lunacy issued to determine the fact." Two things it will be observed, are essential under this Act to create the vacancy: First, the insanity must be confirmed; and second, that fact must be found by a "Commission of Lunacy." But the proceedings whereby it is sought to establish a vacancy in the office to which the defendant was appointed, not only do not show the exist-

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ence of these two pre-requisites, but on the contrary, show that the insanity is not of this character; and furthermore, that the question was not submitted to nor was the insanity found by a commission of lunacy. The proceedings had against Judge Chase, as shown by the record, were such only as are authorized by special statute, providing for the case of persons who may be afflicted with curable insanity, or such as would render it dangerous for them to be at large. The character of proceeding prescribed by that statute to determine the fact bears but little resemblance to a commission of lunacy, or the course pursued under it. That is a commission generally issuing out of a Court of Chancery to certain persons called Commissioners, who are required to inquire whether the person alleged to be insane be so or not. In executing this commission a jury is usually summoned, and the jurors and Commissioners sit together and form the Court, for the purpose of determining the fact. The jury are all sworn or affirmed, and they hear such evidence as the Commissioners admit; and generally notice of the inquisition is required to be given to the alleged lunatic, who is permitted to traverse the allegation of insanity. It is not pretended that such proceedings, or anything analogous to them, were had in this case, and the vacancy because of insanity could only happen in the manner and by the means pointed out by the statute.

For these reasons I concur in the conclusion that no vacancy existed in the office to which the defendant was appointed, and that his commission was void.

THE STATE OF NEVADA, RESPONDENT, v. JOHN McGINNIS, APPELLANT.

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CRIMINAL LAW—JUDGE NOT TO CHARGE AS TO WEIGHT OF EVIDENCE. A charge in a criminal case that "it is the duty of the jury to candidly consider whether in the eye of sound reason these sufficient facts and circumstances detailed in the evidence, pointing beyond reasonable doubt to the existence of the acts and intent as charged in the indictment; and if you so conclude in your minds you must, as jurors upon your oath, so declare," amounts to a charge that the facts detailed in the evidence are sufficient to establish the offense, and that

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the evidence points to the existence of the acts and intent beyond a reasonable doubt, and is error sufficient for reversal.

ERRORS OF TRANSCRIPTION IN RECORD ON APPEAL. On an appeal in a criminal case, where it was plain from the context that the charge to the jury as contained in the transcript was not correctly transcribed: *Held*, that the Appellate Court had no alternative but to accept it as given in the form in which it appeared in the record.

CHARGES TENDING TO MISLEAD JURY IN CRIMINAL TRIALS. Any ambiguity in the charge in a criminal case which may have a tendency to mislead the jury should entitle the accused to a new trial; for every person charged with a public offense has the right to have the evidence weighed by the jury uninfluenced by the opinion of the Judge respecting it—in all respects to have a fair and impartial trial, free from every prejudicial irregularity, and from everything which may so involve the case as to render it difficult or impossible for the jury to arrive at an intelligent conclusion.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The defendant was indicted, at the November Term, 1869, of the Court below, for the crime of assault with a deadly weapon, with intent to inflict upon the person of William D. Knox a bodily injury without any considerable provocation. Having been tried and convicted, and motions in arrest of judgment and for a new trial having been denied, he was sentenced to pay a fine of one thousand dollars, and in default thereof to be imprisoned in the county jail until such fine should be paid, at the rate of one day's imprisonment for every two dollars of the fine.

W. C. Boardman and *A. C. Ellis*, for Appellant.

R. M. Clarke, Attorney-General, for Respondent.

By the Court, LEWIS, C. J.:

In the charge given in this case, which is otherwise clear, explicit, and correct, we find the following incomplete and very ambiguous sentence: "It is, therefore, the duty of the jury, in this case, candidly to consider whether, in the eye of sound reason, these sufficient facts and circumstances detailed in the evidence, pointing, beyond reasonable doubt, to the existence of the acts and intent as charged in the indictment; and if you so conclude in

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your minds, you must, as jurors upon your oath, so declare ; and if you do not so conclude, you must, with equal fearlessness, declare that way."

It will be observed the first portion of this instruction is incomplete, it not being stated what the jury are to consider respecting the "facts detailed in the evidence." It is quite evident, however, from the accuracy and clearness of all other portions of the charge, that this was not given in this form to the jury ; but it is brought here and purports to be correctly transcribed, and so we have no alternative but to accept it as given in the form in which it appears in the record.

In that form, was it error to give it to the jury ? We think it was. Although it appears incomplete, still the Judge seems to charge that the facts detailed in the evidence are sufficient to establish the offense. The jury are told that the evidence points to the existence of the acts and intent beyond a reasonable doubt. What is to be understood by this language, save that the crime charged in the indictment was fully proven ? To say that the evidence points to the existence of the acts and intent as charged in the indictment beyond a reasonable doubt, is tantamount to a charge that it establishes the crime beyond a reasonable doubt. At least, that fact seems to be assumed by the Judge, if the jury is not directly so charged. Under our Constitution he had no right to charge the jury upon the facts—that is, as to the weight—of evidence. (Const., Art. VI, Sec. 12 ; see also *People v. King*, 27 Cal. 513, rendered upon a similar constitutional provision.) Here he seems to have charged, or at least, given an opinion, that the crime was established beyond a reasonable doubt—hence the error.

We are not fully satisfied that it misled the jury—very serious doubts may be entertained as to that—still, in a criminal case, any ambiguity which may have a tendency to mislead the jury should entitle the prisoner to a new trial ; for every person charged with a public offense has the right to have the evidence weighed by the jury uninfluenced by the opinion of the Judge respecting it ; in all respects to have a fair and impartial trial, free from every prejudicial irregularity, and from everything which may so involve the

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case as to render it difficult or impossible for the jury to arrive at an intelligent conclusion.

The defendant must have a new trial.

It is so ordered.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
JANUARY TERM, 1870.

THE VIRGINIA AND TRUCKEE RAILROAD COMPANY
v. THE BOARD OF COUNTY COMMISSIONERS OF
ORMSBY COUNTY.

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EQUALIZATION OF TAXES BY COUNTY COMMISSIONERS. Where a Supplementary Revenue Act (Stats. 1867, 111) provided, that in cases where the County Assessor neglected to make an assessment, the County Treasurer, as *ex officio* tax receiver, should specially assess and collect the taxes; and that if any person felt aggrieved by such subsequent assessment he might apply to have it equalized by the County Commissioners, and that they should determine the matter: *Held*, that the Board of County Commissioners, while sitting to equalize such assessment, was not controlled by the restrictions imposed upon the Board of Equalization sitting under the General Revenue Act; and that it could not, like the Board of Equalization, refuse to equalize an assessment because a sworn statement had been refused on demand of the Treasurer.

CONSTRUCTION OF REVENUE STATUTES AS IN PARI MATERIA. Different Revenue Acts should, as far as possible, be construed as one Act; but the later one must control, if there be any conflict or inconsistency.

SUPPLEMENTARY REVENUE ACT OF 1867. The Supplementary Revenue Act of 1867, (Stats. 1867, 111) providing for assessments by the tax receiver, where the Assessor had made omissions, etc., was intended to authorize summary proceedings; but it gives to all persons so assessed, without conditions, a right to have their assessments equalized by the County Commissioners.

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DIFFERENCE BETWEEN EQUALIZING BOARD OF COUNTY COMMISSIONERS AND BOARD OF EQUALIZATION. The Board of County Commissioners, sitting to equalize assessments for taxes made by the tax receiver under the Supplementary Revenue Act of 1867, is entirely distinct from the Board of Equalization provided for by the General Revenue Laws, though composed of the same persons.

STATUTES RELATING TO DIFFERENT OFFICERS HAVING SIMILAR DUTIES. There is no rule of construction which will authorize the application of provisions contained in any law respecting a certain officer or body, to another and different officer or body, although the laws be *in pari materia*, and the duties imposed upon such officers be similar in character.

DUTY OF COUNTY COMMISSIONERS TO EQUALIZE ALL "SUBSEQUENT ASSESSMENTS." Under the Supplementary Revenue Act of 1867, providing for subsequent assessments in cases where the regular assessments by the Assessor are omitted, the right is expressly given to all persons without exception so assessed, to have their assessments equalized upon making application within the proper time to the Board of County Commissioners; and if the Board refuse to act, it may be compelled to do so by mandamus.

THIS was an original application in the Supreme Court for the writ of mandamus, to compel the Board of County Commissioners of Ormsby County to hear and determine the application of the Virginia and Truckee Railroad Company for equalization of assessments, made under the Supplementary Revenue Act of 1867. (Stats. 1867, 111.) It appears that the company was assessed for ten miles of railroad, in Ormsby County, one hundred and fifty thousand dollars, and for rolling stock eleven thousand dollars; whereas, according to the affidavit of H. M. Yerington, General Superintendent of the company, filed for the purposes of this application, the real value of the property did not exceed sixty-seven thousand and one hundred and fifty dollars.

After the following decision, a petition for rehearing was made and denied. There being no briefs of counsel on file, the following abstracts from the petition on rehearing are given, to indicate the character of the argument on behalf of the Board of County Commissioners.

Thomas Wells, District Attorney of Ormsby County, for Respondent, on petition for rehearing:

I. What do we understand by the term "Supplemental?" Certainly, not that it is an Act which takes from, or cripples

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the original Act; but that it adds to it, gives it broader scope and greater vigor, and supplies some grave omission, or cures some serious defect. If the construction put upon the Act in question is correct, it takes from and cripples the Act to which it is, by well known rules of construction and force of language, an addition; and therefore, of necessity, in part repeals it. This is never the construction given to a Supplemental Act, unless expressed, or so clearly deducible from the language used that any other construction would render the provisions of one or the other Act nugatory, because of direct conflict.

Does the Supplemental Act of 1867, in terms, repeal any part of the General Revenue Act? Certainly not. Does it do so in effect, or by necessary implication? It has long been laid down as the true rule, "That a general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent." (Sedgwick on Stat. and Const. Law, 123.) The reason and philosophy of which rule is thus given: "That when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original Act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter Act such a construction, in order that its words shall have any meaning at all." Judged by the above rule, the Supplemental Act of 1867 does not in effect, or by necessary implication, repeal any part of section fifteen of the General Revenue Act, as amended in 1866.

The General Revenue Act provides that such parties as fail to give statements, on proper demand, shall be debarred of equalization. The Supplemental Act of 1867 provides, that "any person feeling aggrieved by any such assessment, (supplemental) may appear before the Board of County Commissioners and apply to have such assessment equalized, modified, or discharged." It seems to us in the light of the rule and illustrations given by Mr. Sedgwick, as above cited, that the provision of the Supplemental Act in question, that "any person feeling aggrieved, etc., may apply to the Board," etc., means *any person* who under the former

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Act has such right, etc. This construction would give force and effect to both Acts, and result in a just and equable operation alike on all parties of the wise and salutary provision in question of the General Revenue Act.

II. The purview of the Act of 1867 is, to provide for the assessment by the Treasurer as tax receiver, of such persons and property as may have been overlooked or neglected by the Assessor, while he had the legal right to assess, and such persons and property as may have come or been brought into any county after the Assessor's duty ceased. Why would the Legislature, in such an Act, make such a distinction, in regard to what may justly be termed a very important right and a very severe penalty? Certainly not because of the summary character of the proceedings in operating under the Supplemental Act, for that characteristic is fully and fairly accounted for by reason of the shortness of the whole time in which the assessments must be made. Again: is it fair to presume that the shortness of the time given should so operate as to give a privilege not given by the General Revenue Act, and to take away a penalty therein imposed? Would not such a construction guarantee to any one the benefit of his own wrong, who might happen to elude the vigilance of the Assessor, but be caught by the Treasurer?

III. It seems to us that the Legislature used the terms "Board of County Commissioners" and "Board of Equalization" in said Act as synonymous and convertible terms; for in the second section of the Act the following language is used, which must be unmeaning and inoperative, if the two terms are not convertible: "If any change is made in such assessment by the Board of Equalization, the Clerk thereof shall certify to the County Auditor such change." Who is to equalize under the Act? If the Board of County Commissioners, how is any change in an assessment to be certified to the Auditor? The Act says it must be certified to by the Clerk of the Board of Equalization. If, therefore, only the Board of Commissioners act, the change cannot be certified at all to the Auditor, *ergo* the change is ineffectual.

IV. Again: Does the Board of Equalization become *functus*

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officio in October? Had the Legislature provided, *in hæc verba*, that it should so become defunct, it would have transcended its authority under article four, section twenty-six, of the Constitution. But we cannot see that it does so provide. The provision of law is (Stats. 1866, 169, Sec. 15): "*provided, however*, that they shall not sit after the first Monday in October." This does not say, or by necessary implication mean, that the Board shall die an official death on the first Monday in October, but simply that it shall by that time have completed all the work of equalizing the general assessments for the fiscal year. And why? Because it is necessary, in order to collect, within the time required, the taxes so assessed and equalized. Again, if the Board cease, per force of law, to exist on the first Monday in October, why by the same may it not be resurrected, for it is the creature of the statute; and if by the statute it is slain, by the statute it may be raised to life again? Can we impute to the Legislature the weakness of using the language of section two already referred to, if the Board of Equalization, of which it there speaks, is defunct on and after the first Monday in October, until some secret influence or agency galvanize it into life for the operations of the next fiscal year? Could it recognize as sound, the position that a defunct Board could have a living and acting Clerk, unless the law had so specially and plainly provided? (See 8 Cal. 376; 7 Cal. 400; 28 Cal. 254; 18 Cal. 438; 4 Mass. 305; 9 Pick. 87; Smith's Commentaries, 897, 906.)

By the Court, LEWIS, C. J.:

Section one of an Act entitled "An Act supplementary to an Act to provide Revenue for the Support of the Government of the State of Nevada," and other Acts amendatory and supplementary thereto, (Laws 1867, 111) declares, that "the County Treasurers of the respective counties of this State, in their capacity of *ex officio* tax receivers, are hereby authorized and empowered, and it is made their duty, between the third Monday in October and the third Monday of December of each year, to specially assess all persons and property for taxation; and collect the taxes so assessed, in all cases where the County Assessor has neglected or omitted, from any cause, to make the assessment on any person or property in

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the county, or where any person or property has, since the closing of the assessment roll, come into the county: *provided*, any person feeling aggrieved by any such assessment, may appear before the Board of County Commissioners, and apply to have such assessment equalized, modified, or discharged; and the Board of Commissioners shall hold a general or special session to hear and finally determine the matter." By authority of, and in accordance with, the provisions of this law, the Treasurer of the County of Ormsby assessed the property of the plaintiff in that county. The plaintiff, for some reason or other feeling aggrieved by the assessment, applied to the Commissioners to equalize it. They refusing to act, a peremptory writ of mandamus is sought to compel action respecting the matter. As a defense and justification of the refusal by the Board of Commissioners it is argued, that as a demand was made upon the proper agent of the plaintiff for a statement of its taxable property within the County of Ormsby, and he having refused to comply, the Board has no authority to equalize. This position is taken upon the assumption that the provisions of the general revenue law, governing the general assessment, are to control the action of the officers in making this subsequent assessment; and that the Board of County Commissioners, when holding a session for the purpose of equalizing any assessment made by the Treasurer, is to be controlled by the same rules, and limited by the same restrictions, as the Board of Equalization when acting upon the general assessment. But this is a mistake. It is true, statutes of this kind should, as far as possible, be construed as one Act; but still the latter must control if there be any conflict or inconsistency.

Provisions of the original law, or of laws bearing upon the same subject must, if they can, be made to apply to the same subject matter and like circumstances in all. The rule can be carried no farther. Here, the general revenue law provides that the "Assessor shall demand from each person and firm, and from the president, cashier, treasurer, or managing agent, of such corporation, association, or company, including all banking institutions, associations, or firms, within his county, a statement, under oath or affirmation, of all real estate or personal property within the county, owned, claimed by, or on deposit with, or in the possession or control of,

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such person, firm, corporation, association, or company;" and then in the fifteenth section (Laws 1866, 169) it is declared that the Board of Equalization shall not reduce the assessment of any person who has refused to give the Assessor his list under oath, as required. If these provisions are to govern the Treasurer and Board of County Commissioners in the subsequent assessment, clearly the writ in this case should be denied. But it is quite evident it was not the intention that they should. It is manifest from the context of the Act authorizing a subsequent assessment, that it was the purpose to make the proceedings under it summary—the tax becoming due and collectable immediately upon the assessment being made, except when an equalization may be claimed, and no demand, as in the case where the Assessor makes the assessment, seems to be contemplated or required. If not, it certainly could not have been the intention to visit the consequences of a failure to make it upon those thus assessed by the Treasurer.

Again: The provisions respecting the reduction of the assessments of persons who have refused to make a statement, it will be observed, are in the form of a limitation upon the power of the Board of Equalization—it is declared the Board shall not reduce the assessment of such persons. But the Board of Equalization ceased to exist in October, and the Board of County Commissioners is authorized to equalize all subsequent assessments. Now, notwithstanding the two Boards are composed of the same persons, still they are entirely distinct, and very different bodies. They are as completely different as if they were composed of different individuals. Such being the case, can it be said that the limitations which the general revenue law places upon the authority of the Board of Equalization are to be extended to an entirely different body—the Board of County Commissioners? The answer would certainly be in the negative, independent of any express provision of law relieving them from restrictions imposed upon the Board of Equalization. There is no rule of construction which will authorize the application of provisions contained in one law respecting a certain officer or body, to another and different officer or body mentioned in another law—although the laws be *in pari materia*, and the duties imposed upon such officers be similar in character. If,

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then, this law authorizing the subsequent assessment made it the duty of the Board of Equalization to meet and equalize the subsequent assessment without in any wise extending or regulating their power, doubtless it would be held to be limited as in the general law. Such, however, is not the case here. It is not the Board of Equalization, but the Board of Commissioners that is authorized to equalize—which being a different and distinct body, with powers of its own, is not to be controlled by the provisions of the law regulating the authority and jurisdiction of the Board of Equalization.

However, we think the law authorizing the equalization of the subsequent assessment expressly exempts the Commissioners from the restrictions placed upon the other Board: for it declares, that *any person* feeling aggrieved may apply to the Board for relief; the expression “any person” including all persons. Thus, the right is expressly given to all persons, without exception, to have their assessments equalized, upon making application to the Board.

By what authority can any exception be made to this right extended to all without limitation? Had it been the intention of the Legislature to except from the right, thus conferred, those who had refused to make a statement—as under the general law—it is fair to presume that the proper exception would have been expressly made. By the plain letter of the law all persons, without exception, may have any subsequent assessment made upon them equalized, by making the application within the proper time. And we do not feel authorized to make any exception.

The mandamus must therefore issue, commanding the Board of County Commissioners to act upon the application of the relator.

JOHNSON, J., did not participate in the foregoing decision.

Sherwood. v. Sissa.

**B. F. SHERWOOD *et als.*, RESPONDENTS, v. EUGENE SISSA,
APPELLANT.**

STATEMENT NOT CONTAINING ALL THE EVIDENCE. A verdict will not be set aside as being unsupported by the evidence, where the statement does not affirmatively show that it embodies all the material evidence bearing upon the facts found in the verdict.

CERTIFICATE OF JUDGE TO STATEMENT. If it be stated in a statement that it contains all the material evidence, the certificate of the Judge to the correctness of the statement is sufficient to establish that fact; but a certificate that a statement is correct does not show that it contains all the evidence when that fact is not stated in it.

ADHERENCE TO ESTABLISHED RULES OF PRACTICE. It is better to follow a wrong rule in matters of practice, which has been established and generally adopted and acted on, than to adopt a new rule to which, at some future time, equally serious objections may present themselves.

ENTRIES IN ACCOUNT BOOKS. Where, in a suit on an account, the entries in plaintiff's books were received in evidence without objection, and the Court charged that, having been thus received, they were proof, if uncontradicted, to show the transactions and prices therein entered: *Held*, that though such entries might not have been admissible if objected to at the time, yet under the circumstances, the charge was correct.

EVIDENCE ADMITTED WITHOUT OBJECTION. If evidence, secondary or hearsay in its character, be admitted without objection, no advantage can be taken of that fact afterward, and the jury may and should accept it as if it were admissible under the strictest rules of evidence.

PRESUMPTIONS IN FAVOR OF INSTRUCTION GIVEN. It will be presumed by the Supreme Court on appeal, unless the contrary be shown, that all instructions given by the District Court to the jury were pertinent to the issues and the evidence.

AGENCY-RATIFICATION BY IMPLIED APPROVAL. If a principal, being informed by his agent that an act has been done on his behalf, does not disapprove of it, but requests the agent to do something further respecting the same transaction, he ratifies the act so done for him.

ACTION BY AGENT AGAINST PRINCIPAL—TENDER OF STOCK SOLD BY AGENT. If an agent, having stock of his principal in his hands for the purchase of which he has advanced the money, be requested to sell it, and he does so, he cannot be required to make a tender of the stock to the principal before bringing an action against him for any loss sustained in the transaction.

PRESUMPTIONS AGAINST INSTRUCTIONS REFUSED. If an instruction be refused, which, under any state of facts, would be correct, and it be shown to be pertinent to the issues, such refusal is error; but if the instruction would be incorrect under some state of facts, and it be not shown that such was not the case, it will be presumed to be incorrect, as applied to the case made out.

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11	254
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18	445
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19	311
10*	215
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22	397
23	163

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APPEAL from the District Court of the First Judicial District, Storey County.

The complaint in this case contained two counts: the first, for a sum of three thousand, eight hundred and seventy-seven dollars and twenty-seven cents, for so much money paid, laid out, and expended for the use of defendant in the purchase and sale of various stocks at his special instance and request, which said sum he undertook and promised to pay; the second, for a like sum for work and labor done and performed in the purchase and sale of various stocks at defendant's instance and request, which said sum, in consideration thereof, he undertook and promised to pay.

The judgment was for the amount claimed. Among the defendant's instructions, which were refused, and which are commented on in the opinion, were the following:

1st. A broker who is employed to purchase stocks, and is authorized by usage or by an express agreement to make the purchase in his own name, without disclosing the name of his principal, has no right to maintain an action against his principal for not furnishing him with money to pay for the stocks, without showing that he had demanded payment of the price, and had transferred or offered to such principal the stock he had purchased.

2d. If the jury believe from the evidence that plaintiffs have not actually paid out the money sued for, but that Sherwood and Freeborn paid the same for the defendant, you should find for the defendant.

3d. The money sued for must be proven to have been actually paid by plaintiffs; and if the jury believe from the evidence that plaintiffs have not paid the same, they should find for defendant.

4th. Under the second count in the complaint, plaintiffs must prove that they rendered services for defendant at his special instance and request, and they must also prove what such services were reasonably worth; and if there is not any proof as to what such services were reasonably worth, you should find for defendant.

Henry K. Mitchell, for Appellant.

I. The following authorities support the proposition that the

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evidence from the books, and the books, were insufficient. (*Kent v. Garvin*, 1 Gray, 148; 1 Greenl. on Ev., Sec. 115, and note 3 and authorities; Greenl. on Ev., Sec. 117 and note.)

II. The refusing of defendant's instructions was error. (*Merwin v. Hamilton*, 6 Duer, 244, and authorities there cited.)

III. The giving of plaintiff's instructions was error. (1 Gray, 148; 8 Walls, 544; 5 Walls, 432; 9 S. & R. 285; 12 Pick. 139; 3 Cush. 342; 23 Cal. 264.)

Hillyer, Wood & Deal, for Respondents.

I. The Court cannot review the evidence with a view to ascertain its sufficiency to support the verdict, for the reason that it does not appear that all the evidence is in the record. (*Howard v. Winters*, 3 Nev. 539.)

II. If the evidence should be reviewed it will be found to fully sustain the verdict. The books were admitted without objection, and the entries show the entire transactions between the parties, money paid for the purchase, money received from sales, amount paid for assessment, and balance as found by the verdict.

III. The testimony shows that the purchases were made in pursuance of express instructions, and that the express sales were made in pursuance of instructions, either general or special. It further shows, which obviates the necessity of any other proof, that after all the transactions were concluded, an account was tendered to the defendant and he failed to dissent from anything done.

Henry K. Mitchell, for Appellant, in reply.

I. The only certificate in any case now required by statute is that of the Judge "that the same has been allowed by him, and is correct." (Practice Act, Sec. 197.) The statute having thus specified the certificate to be attached, or to accompany the statement, the presumption is that all the evidence bearing upon or relating to the "particular specification" is contained in the statement, when such certificate accompanies it.

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II. The books were not offered or admitted in evidence. On the contrary, counsel for defendant was replete with objections as to their admissibility when offered. Not having been offered, no objections were, of course, interposed.

The transcript contains the following note: "The counsel for plaintiffs, as the witness W. W. Price was being examined touching the various items of account, stated to the Court that as the said witness should testify to each item of said account from the journal, that the items so testified to would be considered as offered and introduced in evidence; to which the Court assented and so ordered." It appears from the above that the books were not offered in evidence, but that each item of the account testified to by the witness Price would be considered as offered and introduced in evidence.

By the Court, LEWIS, C. J. :

The respondents, Sherwood and Freeborn, recovered judgment in this action against Sissa for the sum of thirty-nine hundred and sixty-two dollars, being the balance due them for advances made in the purchase of certain mining stocks for the defendant, together with their commissions and other expenses attending the transaction. The evidence shows that the respondents were stock brokers, having an office for the transaction of their business in the City of Virginia, but generally filling orders through their correspondents or agents in San Francisco. It appears the defendant at various times during the year 1868 employed them to purchase certain stocks for him, which was done in accordance with his orders, the purchases being on time. When the payments became due, however, the defendant failed to meet them, requested the plaintiffs to sell the stocks, and re-purchase them as before; but he again failed to make the payments, and when spoken to respecting the matter he requested the plaintiffs to sell them as their judgment might dictate. This was done, Sherwood testifying that they disposed of the stocks to the best advantage possible. The result was that the defendant was a loser to the extent of the sum here claimed, and for which judgment is rendered.

A motion for new trial was made upon the grounds: First, that

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the evidence was insufficient to support the verdict; and second, error in giving certain instructions at the request of the plaintiff, and refusing others asked by the defendant. Under the first general ground several specifications are made as required by law. The motion being denied an appeal is taken, the same grounds being relied on here as in the Court below.

There is nothing in the statement from which it can be ascertained whether all the evidence produced at the trial upon the various points respecting which it is claimed to be insufficient, is contained in the record. For this reason the verdict cannot be set aside upon the first assignment. It has been several times held by this Court that a verdict will not be set aside as being unsupported by the evidence where the statement does not affirmatively show that it embodies all the material evidence bearing upon the facts found in the verdict. (*Howard et al v. Winters*, 3 Nev. 539.) Nor can any rule be more reasonable or just. The certificate of the Judge settling the statement does not cover this fact. He only certifies that what is embodied in the statement is correctly stated. It cannot be claimed that his certificate goes further. He does not pretend to certify that it contains all the evidence offered in the case, or even upon any particular point. If it were stated that it contained all the material evidence offered upon the particular facts claimed to be unsupported, the certificate of the Judge to the correctness of the statement would of course be sufficient to establish that fact. As the Judge only certifies that what is set out in the statement is correctly set out, we cannot understand how it shows that the statement contains all the evidence when that fact is not stated in it by the person making it up; nor do we think there is any warrant for indulging the presumption that all the necessary evidence is embraced in it. On the contrary, the presumption, always is that the decision of the lower Court is correct in every particular until it be affirmatively shown otherwise, and the Courts without exception require such showing to be made by the appellant. By this is to be understood that the party appealing must make such an affirmative showing in the upper Court as to exclude all probability of the correctness of the decision rendered against him. To presume that a statement contains all the evidence when such

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is not expressly shown to be the case, and upon that presumption to set aside the decision, would simply amount to a reversal of the rule so well established and so familiar to the profession, and render it necessary for the respondent to maintain the correctness of the proceedings in the Court below rather than for the appellant to establish the contrary. There appears to be no good reason for disturbing a practice so reasonable as that heretofore established and followed in this State ; and even if there were, it is not certain that it should be done, for in rules of practice certainty and uniformity are as desirable as correctness. The Court that overturns a rule of practice which has become familiar to the profession and to which it has given its own sanction, generally only involves the practice in perplexing doubts, and frequent cases of hardship and injustice are the natural and inevitable result. Hence we think it better to follow a wrong rule in matters of practice which we have ourselves established, and which has been generally adopted and acted on, than to adopt a new rule to which at some future time equally serious objections may present themselves. But as the practice heretofore followed seems not only to be eminently just and reasonable, but also in harmony with well settled legal principles, there is certainly no warrant for disregarding it and adopting a different. For these reasons we must decline to inquire whether the verdict or judgment be supported by the evidence or not.

Under the second assignment of error it is argued that the Court erred in charging the jury thus : "The entries in the books of the plaintiffs have been received in evidence without objection, and they are proof, if uncontradicted, to show the transactions and prices there entered." It will not be necessary, in the consideration of this instruction, to determine whether books of account are admissible in evidence in this State if objected to at the proper time. In many of the States they are not admissible under any circumstances, in some they are made so by statute, and again in others they are admitted when accompanied by the suppletory oath of the person by whom the entries were made. The only question which can be made upon this instruction is, whether books of account being offered and admitted in evidence without objection, should be received by the jury as evidence tending to prove the facts embodied

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in the entries. These entries certainly constituted some proof of the facts sought to be established by them—weak and unsatisfactory perhaps—still evidence. Possibly not the best evidence of the fact, perhaps incompetent if objected to, but being admitted, as they were, they become evidence in judgment of the law by the consent and admission of counsel for the defendant. If the books were in fact secondary evidence and incompetent, still they might be admitted by the consent of the parties. If evidence secondary or hearsay in its character be admitted without objection; no advantage can be taken of that fact afterwards, and the jury may, indeed should, accept it as if it were admissible under the strictest rules of evidence. These rules, so far as they require the best evidence capable of being produced, or the exclusion of hearsay is concerned, may certainly be waived by the parties interested, and in contemplation of law they are waived if no objection be made at the proper time. No authority is perhaps necessary in support of a rule so obvious; but we may refer to the case of *Brahe v. Kimball*, (5 Sand. 237) in which this very question was raised and discussed—the Court saying in respect to it: “It is not necessary to determine whether the entries in the books of the defendant which were read by the then counsel upon the trial were proper evidence of the facts they were adduced to prove. No objection was made to them at the time, nor were they read subject to any future objection. They became evidence therefore in judgment of law, by the admission and consent of counsel for the plaintiff, and it was the duty of the Judge to submit them as evidence to the consideration of the jury.” It follows that the Court below properly charged the jury in this case that the books were evidence properly submitted to their consideration.

The claim that the books were not in fact offered in evidence is not warranted by the record before us. But, however that may be, it is not shown affirmatively by the appellant that they were not; consequently it must be presumed in favor of the action of the lower Court that they were.

Unless the contrary be shown, it must be presumed that all instructions given by the Court were pertinent to the issues, and the evidence. It is incumbent on the appellant to make out his

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case affirmatively by a showing sufficient to overcome this legal presumption. Upon this point, for example, as it is not shown that the statement contains all the evidence, appellant should have stated the fact that the books were not offered.

The minute of Court referred to as showing that they were not certainly does not bear the construction placed upon it by counsel for defendant. The only inference that we can draw from it is, that the books being in evidence, counsel for plaintiff suggested that they be considered as introduced in support of each item therein, as the witness Price testified to them, to which the Court assented. If the books had been admitted, of course they should be accepted as evidence in support of each item or entry contained in them without any further offer. If they had not been actually admitted, then the order of the Court that they should be considered as offered as each item was testified to, is in effect an admission of them in evidence, and any objections to them should have been interposed at that time. But, whatever other construction may be placed upon the very ambiguous language of this minute, it certainly cannot be held to show that the books were not admitted. There is no error in the instruction itself, therefore; nor is it made to appear that it was not warranted by the facts of the case.

The Court also charged the jury that, "if you find, after the purchase of stocks and payment therefor by the plaintiffs, they informed defendant of such purchase, and defendant did not dissent therefrom but desired plaintiffs to carry the stocks for him a longer period, then this was a ratification of the purchase, and it was of no consequence whether the purchases were originally authorized or not. Nor is there any question in such case in regard to a delivery, or an offer of delivery, of the stocks of plaintiff." The first portion of this instruction respecting the ratification of the purchase is undeniably correct. Nothing can be better settled than that if the principal, being informed by his agent that an act has been done on his behalf, does not disapprove of it, but requests the agent to do something further respecting the same transaction, he ratifies the act so done for him. As to the second clause of the instruction, it might, under some state of facts, be incorrect; but it was perfectly proper in connection with the evidence in this case.

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It appears, by undisputed testimony, that the defendant not only requested the plaintiffs to carry the stocks for him, but also to sell them to the best advantage possible. It is also shown that they were sold. Such being the case, how can there be any question of delivery, or offer of delivery, of them to the defendant. If plaintiffs were requested by defendant to sell, and they did so, certainly they cannot be required to make a tender of the stock prior to bringing an action for the loss sustained in the transaction. Had there been no express authority or request to sell, it is possible no action could be maintained for the purchase money of stock advanced by a broker until a tender of the stock were made: whether it could or not is not necessary to decide. It is only necessary here to say that it cannot be required when they have been sold by authority, as in this case. The instruction was perfectly correct, in connection with the facts of the case. The other instructions, given at the request of plaintiffs, are equally free from objection. ■

The first four instructions asked by the defendant and refused, were all pointed to the proposition that there should have been a tender of the stocks before this action was brought. The facts, as has already been said, do not appear to warrant such instructions, hence we must presume they were properly refused.

The fifth instruction refused also seems entirely unwarranted by the evidence. It was a matter of no consequence to the defendant that the plaintiffs had not paid for the stocks, or that their agents instead of themselves had done so. They procured the stocks for him; that was sufficient to enable them to recover their market value. But it is shown that the stocks were in fact purchased by the agents of plaintiff, and that in a settlement with them they were paid for. So there appears to be no issue or evidence whatever to call for such instruction. It was, therefore, properly refused.

Again: The seventh instruction, which it is claimed the Court should have given, assumes that there was no express promise to pay the sum claimed in the second count of the complaint. If there were, it would be entirely unnecessary to prove that the services performed were reasonably worth the amount claimed to be due. Whether they were or not does not appear. The contrary not being shown, it cannot be presumed that a state of facts existed

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which would render the action of the Court below incorrect. If the instruction were one that would under any state of facts be correct, and it further appeared to be pertinent to the issues, the error would be sufficiently shown; but where, as in this case, it would be incorrect under some state of facts, and it is not shown that such was not the case, it must be presumed that it was incorrect as applied to the case made out. In other words: we cannot presume that a state of facts existed which would render the action of the Court below erroneous where the opposite presumption is equally admissible. The error must be affirmatively shown. The defendant should in some way have satisfied this Court that the instruction was pertinent to the proof; that the plaintiffs sought to recover a sum for services upon an implied contract that there was no express promise to pay; in which case it might be incumbent upon them to prove that they were reasonably worth the sum claimed. This is not done.

Our examination of the case leads us to the conclusion that the judgment below must be affirmed.

It is so ordered.

JOHNSON, J., did not participate in the foregoing decision.

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THE VIRGINIA AND TRUCKEE RAILROAD COMPANY, RESPONDENT, v. A. B. ELLIOTT, APPELLANT.

RAILROAD CONDEMNATION OF LAND—QUANTITY. The Railroad Act of 1865 (Stats. 1864-5, 427, Sec. 20) prescribes that State land along the line of a road may be taken for the building of depots and other necessary buildings on payment of the value thereof, provided no such piece of land taken shall exceed two acres in extent: *Held*, that this limitation of two acres does not apply to lands of individuals, and that in regard to such lands a larger quantity, if necessary, may be condemned.

EXPRESSIO UNIUS EXCLUSIO ALTERIUS. It is the presumption, when one person or thing is expressly mentioned in a statute, that all other persons and things are to be excluded.

SETTING ASIDE OF REPORT OF RAILROAD COMMISSIONERS. The Railroad Act of 1865 (Stats. 1864-5, 427, Sec. 31) provides that, when land is taken and the

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Commissioners make their report, if any party be dissatisfied he may "move to set aside the report, and to have a new trial as to any tract of land, upon good cause shown therefor; and the said Court or Judge shall set aside the report as to such tract of land": *Held*, that the meaning was, not that the report should be set aside as a matter of course, because of dissatisfaction, but only on good cause shown.

RAILROAD DEPOTS AND BUILDINGS—HOW MUCH LAND NECESSARY. The question as to the quantity of land which, under the Railroad Act, a company may take on the ground of its being necessary for its depots and other buildings, must be determined by the evidence produced, and depends upon many facts and circumstances for which there is no exact standard.

VALUATION BY COMMISSIONER OF LAND TAKEN FOR RAILROADS. The valuation of lands taken for railroad purposes by commissioners appointed under the Railroad Act will not be disturbed, if there be any substantial testimony to support it.

NECESSITIES OF RAILROADS NOT TO BE CONSIDERED IN VALUING LAND TAKEN. In awarding the compensation to be paid for land taken by a railroad company, its full actual value should be given: and in ascertaining such value everything generally, which actually enhances its present worth, should be taken into consideration, but not the fact that it is necessary or indispensable for the railroad to have it.

CONSTITUTION—POWER TO APPOINT RAILROAD COMMISSIONERS. On objection made that the appointment of commissioners to fix compensation for land taken for railroad purposes was a matter pertaining under the Constitution to the executive, and could not be exercised by the judicial department: *Held*, that, as the Constitution does not point out the manner in which private property shall be taken, the Legislature has the power to prescribe any method which will produce a just and fair result, and that there was no more reason why the commissioners should be appointed by the executive than by the judiciary.

OBJECTIONS NOT TAKEN BELOW NOT AVAILABLE IN APPELLATE COURT. On appeal from an award of compensation for land taken for railroad purposes, objections that the commissioners did not meet at the time fixed, and did not file their report within the period allowed by the Court, cannot be taken for the first time in the Appellate Court.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

A. B. Elliott, in pro. per., for Appellant.

I. It may be said that the proviso of section twenty of the Railroad Statute of 1865, "that no one depot, watering-place, machine or work-shop, or other buildings for the convenient use of said roads,

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shall cover over two square acres each," applies only to the land of the State, and not to that of private individuals. I contend that if the State was so cautious as to provide that only two square acres of its lands should be taken by railroad companies for their purposes, *a fortiori* should it be presumed that the State intended that the same rule should apply to the lands of private individuals.

II. The Railroad Act, section thirty-one, deprives the Court or Judge of any discretion as to whether he shall set aside the report and grant a new trial. It says that he *shall* do so, but that he shall not recommit to Commissioners such matter more than twice. If the Legislature has expressed its intention clearly, that intention must be followed regardless of consequences. (*O'Neil v. New York and Nevada S. M. Co.*, 3 Nev. 153.)

III. The locality and quantity of the land show that it is not necessary, nor proper, that plaintiff should take so much as it seeks to do in this proceeding.

IV. The evidence did not justify the report, inasmuch as it shows the land to be worth a much larger sum than the five hundred dollars awarded, and at least seven hundred and fifty dollars.

V. The question ruled out was proper. The statute (Sec. 30) provides that "in ascertaining and assessing such compensation, they shall take into consideration, and make allowance for, any benefit or advantages that, in their opinion, will accrue to such person or persons by reason of the construction of the railroad, as proposed by said company." In this case, plaintiff takes all of defendant's land, and hence, no benefit or advantages can accrue to him by reason of the construction of the railroad. Whatever facts and circumstances, or reasons, therefore, in the minds of the witnesses give value to the property, must be taken into consideration by them in forming their opinions in reference to its value. (*Jacob v. City of Louisville*, 9 Dana, 114; *Sedgwick on Damages*, 566; 2 Kent's Com. 399, and note; *Central P. R. R. Co. v. Pearson et al.*, 35 Cal. 261.)

VI. The condemnation and appropriation of private property to public use is the exercise of the right of eminent domain, and

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hence, of a right of sovereignty, and therefore should be carried into execution by and through the instrumentality of those officers of government who exercise the sovereign functions or powers of government, and not by and through those who do not possess sovereign functions—as judicial officers, whose duties are simply judicial, to declare the law and order judgment accordingly. The Commissioners, therefore, should have been appointed by the Governor of the State, and not by the District Judge. (*Bloodgood v. Mohawk and Hudson R. R. Co.*, 18 Wend. 69; 2 Kent's Com. 391; Sedgwick on Damages, 566.)

VII. The taking of private property for public use proceeds upon the idea of public necessity: as a right of way, etc.; but what necessity can there be for a railroad company to condemn and appropriate the property of a citizen which lies off of the line of its road? It cannot be necessary for such company to have the power for the purposes of machine-shops, depots, work-shops, etc.; for if it cannot purchase land for these purposes at one place on its road, it can at another.

VIII. The statute allowing and providing the way by which private property may be taken for public use is in derogation of common right, justice, and law—and hence, must be strictly pursued and construed. In this case it was not strictly pursued—for the order of the Court directed that the report of the Commissioners should be made within twenty days from their first meeting, whereas it was not made within that time.

Hillyer, Wood & Deal, for Respondent.

I. The right of eminent domain gives to the Legislature the control of private property for public uses. (2 Kent's Com. 338.)

II. The use of land for railroad purposes is a "public use" within the term, as used in our Constitution. (*Contra Costa R. R. Co. v. Mars*, 23 Cal. 326; *Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige's Ch. 73.)

III. The Constitution does not prescribe the mode in which the compensation shall be ascertained; that was left for the Legislature

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to determine, and it determined it. (*Beekman v. Saratoga and Schenectady R. R. Co.*, 3 Paige's Ch. 75; *Gibson v. Mason*, Oct. Term, 1869.)

IV. The plain meaning of section thirty-one of the Railroad Act is, that the report should be set aside and a new trial granted, only in cases where good cause is shown. This is the meaning placed upon a similar section by the Supreme Court of California, in 35 Cal. 259. The statute of this State was copied from the statute of California. (Hittell's Gen. Laws of Cal. 856.)

V. The compensation required to be paid to owners of property appropriated for public use is the actual value of the land. (Sedgwick on Damages, 5th Ed. 666; *C. P. R. R. Co. v. Pearson*, 35 Cal. 261.)

VI. The Commissioners did not err in refusing to allow appellant to ask the question as to the necessities of the railroad. The evidence sought to be elicited would have established a speculative value, and not the market value.

VII. The statute provides that the Commissioners shall view the land and hear the evidence of witnesses, in order to ascertain the compensation to be paid. Although they are not to be guided solely by the authority of their senses, that should certainly have great weight with them. In this case there is a conflict in the testimony of the witnesses as to the value of the land and improvements claimed by the defendant. His witnesses fix the value at from seven hundred and fifty dollars to one thousand dollars. Respondent's witnesses testify that five hundred dollars would be a big price. It is to be presumed that the value fixed by plaintiff's witnesses corresponded with the opinion the Commissioners formed in viewing the premises. The Court will not disturb the award when there is evidence to sustain it. (*Brady v. Brown*, 20 Cal. 520.)

VIII. The report of the Commissioners was filed within the time provided by statute, but by some oversight the statement recites that the Court appointed the twenty-third instead of the twenty-sixth of July. The objection made by appellant was never

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made until he filed his brief. No such objection can be found in the records. The statute providing that the report should be filed within twenty days after the first meeting of the Commissioners is merely directory, and the failure to file within the time does not invalidate the report. (*Keller v. Satuck*, 22 Cal. 471.)

By the Court, LEWIS, C. J. :

In accordance with the requirements of section twenty-four of the Statutes of 1865, page 438, the plaintiff filed its petition in the District Court for the County of Storey, setting forth that it was duly incorporated on the second day of March, A.D. 1868; that it still continues to exist, and is now actually engaged in the construction of its railroad between the City of Virginia in said County of Storey, and the City of Carson in the County of Ormsby; that the line of the railroad has been surveyed, and a map thereof made; that the line as surveyed and laid down in the said map has been adopted by the company as the route of the said road; that the line selected passes over certain premises in Virginia City described as lot five, in block two hundred and thirty-one, range "I"; that certain other premises contiguous thereto, and particularly described in the petition, are necessary to the company for the purpose of enabling it to erect its depots, machine- and work-shops, and other buildings. After alleging that the appellant Elliot is the owner of a large portion of the premises described, it prays that it may be permitted to take possession thereof, and that Commissioners may be appointed to assess the value or compensation to be paid to the appellant therefor. Commissioners were regularly appointed, and after hearing evidence offered by both parties, they assessed the value of the property at five hundred dollars, which was tendered to the appellant; but he being dissatisfied with the report, moved to set it aside, which being refused he takes an appeal, claiming a reversal of the proceedings below upon several grounds, which will be considered in the order in which they are discussed by counsel.

I. It is argued that the report is erroneous, because it awards to the plaintiff more land than it has the right to claim under the law for the purposes designated in the petition. Section twenty of

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the Act referred to, it is true, limits the amount of State land to be appropriated for the purposes mentioned to two acres, but there is nothing in the Act extending such restriction to land belonging to individuals. But it is contended that as this limitation is imposed respecting land belonging to the State, it must be presumed it was the intention of the Legislature to extend it to the land belonging to the citizen also. By a well known and familiar rule of construction, however, the presumption is the other way. The mention of one thing or person, is in law an exclusion of all other things or persons. Here the Legislature having expressly chosen to declare that no more than two acres of the State's land shall be taken for the erection of any one depot, or other buildings, is it not perfectly manifest from the failure to extend the same provision to other land in express terms, that it was not the intention it should apply? By the rule quoted no land except that belonging to the State could be included within the limitation; and as there is nothing in the law authorizing a departure from this rule of construction it must be followed, and the section held to apply only to lands belonging to the State.

II. It is claimed that section thirty-first of this law makes it the duty of the District Judge to set aside the report of the Commissioners whenever either party is dissatisfied with it, and a motion is made to that end. But this is very clearly a misconstruction of the law. The language of the section is: "The said company, or any of said defendants, if dissatisfied with the report, may within twenty days after the time for the filing of said report, and after ten days' notice to the parties interested, move to set aside the report and to have a new trial as to any tract of land, upon good cause shown therefor; and the said Court or Judge shall set aside the report as to such tract of land, and may recommit the matter to the same or to other Commissioners, who shall be ordered to proceed in like manner as those first appointed; but such matter shall not be more than twice recommitted to Commissioners." Clearly, this section does not make it the duty of the Court or Judge to set aside the report in every case when either party may be dissatisfied with it, regardless of the merits of the matter. The fair construction of the language is, that the report may be set aside upon good cause shown,

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not as a matter of course upon the application of either party. The words, "the said Court or Judge shall set aside the report," must be taken in connection with what precedes, and thus the action of the Court is to be controlled by the condition upon which it is declared the party shall be entitled to a new trial—that is, "upon good cause shown therefor." Why attach the condition of "good cause shown" to the person's right to a new trial in the first portion of the section, if it be the duty of the Court to grant it without condition or a showing of good cause? Evidently, it is only when good cause is shown that the Court or Judge is authorized to set aside the report.

III. It is next contended that the quantity of land claimed by the company is not necessary for the purposes claimed by it. But whether it be necessary or not must be determined by the evidence, and it is proven to be necessary. It is claimed by the company for depot and other building purposes, and its officers testify that it is necessary for this purpose. It cannot be presumed, either from the quantity or location of the premises, that it is not necessary, when the only testimony in the record shows the contrary. Indeed, the necessities in such cases are to a great extent to be determined by the company itself; at least, if it appear that it is acting in good faith, and there is evidence showing that the land claimed by it is necessary for the purpose of enabling it to erect such buildings as its business may require, the Courts cannot hold, without any evidence tending to overcome such state of facts, that the necessities do not exist. There is no exact standard in such case whereby the wants of the company may be definitely ascertained. Its necessities, so far as the quantity of land it may require for building purposes is concerned, depend upon various and varying facts and circumstances. We do not wish to be understood as intimating that a company may claim land in a locality off the line of its road by showing that it is necessary to it. The question here is simply whether the quantity of land claimed is necessary for the purposes to which it is to be devoted, and not whether a company may, under the plea of necessity, claim land not contiguous to its road. Whether one acre or five be necessary for building purposes at any

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one point, must depend upon facts peculiarly within the knowledge of the officers of the company ; and if by their testimony it be shown that a given quantity be necessary, we cannot see how, with no evidence to overcome such proof, a Court can hold it unnecessary. This Court clearly cannot disturb the action of the Judge below on this ground.

IV. That the Commissioners did not award to the appellant the value fixed upon the premises by the weight of evidence, is the fourth assignment of error. If it be admitted that the testimony reported in the record preponderates against the conclusion of the Commissioners on this point, it cannot be said, in any view that may be taken of it, that the preponderance is so great and decided as to justify an interference with the report. There is testimony decided and substantial in support of it; and furthermore, under the statute, the Commissioners are required to examine or view the land themselves, which was done in this case ; and thus their opinion of its value is added to the testimony of the witnesses on behalf of the respondent. Under such circumstances the decision of the Commissioners will not be set aside if there be any substantial testimony to support it. Such is the rule repeatedly announced, and we think uniformly followed. (See *Piper's Appeal*, 32 Cal. 530, and cases there cited.) This case very clearly comes within the rule, and hence the report cannot be disturbed.

V. The appellant, examining one of his witnesses respecting the value of the premises in question, put this question : " What is the value of the tract of land claimed by me, taking into consideration the fact that the mine of the Chollar Potosi Company lies west of it, the mine of the Julia Gold and Silver Company to the south, and the mine of the Senator Company to the north ; that these mines may be developed and turn out rich ; that the Railroad Company has located its road near this tract, and that *it desires it for the purpose of putting up its machine shops and other buildings*, and that its value will be increased by the erection of such buildings ? "

This question was objected to, the objection sustained, and appellant complains of the decision as error. The ruling was correct.

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A company possessing this sovereign power of entering upon and taking the land of the citizen *in invitum* should certainly be made to render a complete, just, and liberal compensation to the owner whose property they so appropriate. To secure the unrestrained enjoyment of property is one of the first and most vital objects of government, and theoretically at least in this country the right is secured and protected by the strongest possible guaranties, admitting of no exception save where the public welfare, which in all governments is superior to individual rights, demands it. And when so demanded, the compensation awarded should be liberal without being unjust to the public, and this is accomplished by the payment of the full actual value in money, of the property claimed. (*Sullivan's Heirs v. The City of Louisville*, 5 Dana, 28.) In ascertaining that actual value, generally everything which actually enhances its present worth should be taken into consideration; not, however, the fact that it is necessary or indispensable for the purposes for which it is claimed by the public. Those necessities which induce it to be claimed, or the fact that it is desired for public use, should in no wise enter into the consideration of its value. To allow that would be to measure its value by the immediate necessities of the public, rather than its actual worth. The Constitution secures a "just compensation," not a compensation to be regulated by the necessities which may compel its appropriation to the public use. The actual value in money, to be ascertained by its location, the price at which similar land may be or has been sold in its vicinity, or what it would itself sell at, is the measure of damage. The public, or a company to whom the right of eminent domain is extended, is certainly entitled to have the land claimed by it at its fair market price, unaffected by the fact that it may be desired by it. Were it not so, the value of land would always be regulated, not by what it might be actually worth in the market, but by the extent to which it might be necessary for public use, and thus a piece of land otherwise worthless might become invaluable from the fact that its location would make its appropriation absolutely indispensable to the building of a public work. A tract of land for example, may be so situated that it would be impossible to construct a railroad without securing it. In such case can it be claimed that its value is to be

The Virginia and Truckee Railroad Company v. Elliott.

estimated by that fact? We think not. Such would not be a just valuation. The question propounded to the witness, however, assumes that it might be taken into consideration in his estimate of the value of the appellant's land. The Commissioners for this reason properly ruled it out.

VI. The sixth point made by appellant does not appear to us to possess the force assumed for it. The course here pursued of allowing each party to select each a Commissioner and the Court to appoint the third is the usual method pursued in proceedings of this kind; nor does there seem to be any constitutional objection to it. The manner in which private property shall be taken is not pointed out in that instrument, hence it would seem the Legislature has the power to prescribe any method which will produce a just and fair result. There seems to be no more reason why the Commissioners should be appointed by the executive than the other coordinate branch of the government—the judicial. The proceedings whereby a citizen is thus deprived of his property, and the just compensation to which he may be entitled is to be ascertained, are essentially judicial in their character, and therefore the appointing of and supervision over the Commissioners is very properly given to the judicial tribunals. We can see nothing unconstitutional in the course directed to be taken by the law regulating these proceedings.

VII. The seventh assignment is based on an apparent discrepancy in a matter of time, and was not suggested in the Court below. It is stated in the report of the Commissioners that the Court directed them to meet on the twenty-sixth of July, and that they did so; and it also appears that the report was filed within twenty days from that time. The agreed statement, however, shows that the Court ordered the first meeting on the twenty-third, in which case the report was not filed within the time specified. But the report of the Commissioners is to govern in this respect, for a statement does not seem to be contemplated in cases of this character, the review being on the report itself. (*C. P. R. R. v. James Pearson*, 35 Cal. 247.) However, without deciding this question, it is

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certain that the point is not available in this case, even if the question can be raised in a statement, for the reason that it was not raised in the Court below, when, if it had been suggested, the time of meeting could have been definitely determined. The report itself showing a strict compliance in this respect with the law and the order of the Court, and as the point is first made in this Court, it must be disregarded.

The order of the lower Court refusing a new trial is affirmed.

**T. W. W. DAVIES, RESPONDENT, v. LEMUEL C. McKEEBY,
APPELLANT.**

5	300
20	438
19*	
5	300
22	438

RIGHT TO VOTE—REGISTRY—LAW OATH UNCONSTITUTIONAL. The registry law (Stats. 1864-5, 382) provided that no person should be entitled to have his name registered—and consequently to vote—until he had taken an oath that he had not, after arriving at eighteen years of age, been voluntarily engaged in rebellion against the government; while the Constitution (Art. II, Sec. 1) provides that no such person should be allowed to vote unless an amnesty be granted: *Held*, on an application for registry by one who could not take the prescribed oath, but was entitled under the Constitution to the right of suffrage, that the oath required by the registry law was unconstitutional, and that as the registry agents could not alter or modify it so as to leave out the objectionable part, the entire oath must fall.

CONSTRUCTION OF STATUTES—UNCONSTITUTIONALITY. The form of a law by which a person is deprived of a constitutional right is immaterial; it is a nullity, whatever be its form.

STATUTES TAKING AWAY CONSTITUTIONAL RIGHTS IN EFFECT. A statute which makes the enjoyment of a constitutional right depend upon an impossible condition or upon the doing of that which cannot legally be done, is equivalent to an absolute denial of the right under any condition: the effect, and not the language of the statute in such case, must determine its constitutionality.

POWER OF PRESIDENT OF UNITED STATES TO PROCLAIM AMNESTY. The Constitutional power of the President of the United States to pardon includes the right to proclaim an amnesty.

AMNESTY, WHAT. Amnesty is a general pardon granted to a class of persons by law or proclamation; and the act of amnesty in such case is as properly a pardon as if simply granted to an individual by deed.

REGISTRY OF PERSONS ENTITLED TO VOTE—MANDAMUS. The Registry Agent appointed under the registry law (Stats. 1864-5, 382) may be compelled by mandamus to register the names of all persons applying and entitled under the Constitution to vote.

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APPEAL from the District Court of the Second Judicial District, Ormsby County.

The facts are stated in the opinion.

R. M. Clarke, for Appellant.

A. C. Ellis, for Respondent.

[No brief of either counsel on file.]

By the Court, LEWIS, C. J. :

The Constitution of this State (Art. II, Sec. 1) provides that: "Every white male citizen of the United States, (not laboring under the disabilities named in this Constitution) of the age of twenty-one years and upwards, who shall have actually, and not constructively, resided in the State six months and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now are or may hereafter be elected by the people, and upon all questions submitted to the electors at such election: *provided*, that no person who has been, or may be convicted of treason or felony in any State or Territory of the United States, unless restored to civil rights, *and no person who, after arriving at the age of eighteen years, shall have voluntarily borne arms against the United States, or held civil or military office under the so-called Confederate States or either of them, unless an amnesty be granted to such by the Federal Government*; and no idiot or insane person, shall be entitled to the privilege of an elector."

It will be observed from this language that there are three classes of persons who, although they may have borne arms against the government, are still entitled to all the privileges of an elector. These are: First, all those who so bore arms before they were eighteen years of age, and not afterwards; second, all persons who did so by compulsion; and, third, all those to whom an amnesty is granted by the Federal Government. The section above quoted may therefore be construed as if it read in this manner: Every

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white male citizen of the United States, including all persons who, prior to the age of eighteen years, and not afterwards, voluntarily bore arms against the government of the United States; all persons, regardless of age, who did so by compulsion; and also all persons to whom an amnesty is granted by the Federal Government, shall be entitled to vote. Hence, these three classes of persons (so far as the right of suffrage is concerned) stand in precisely the same position as if they had never been engaged in rebellion against the United States. Upon this point the language of the Constitution is too clear to admit of a difference of opinion. The right of suffrage is as unqualifiedly given to these three classes as it is to any person, for they are expressly exempted from the general provision disqualifying those who bore arms against the government. But the registry law of this State (Stats. 1864-5, 382) deprives those who, after arriving at the age of eighteen years, voluntarily bore arms against the United States, of the elective franchise, notwithstanding an amnesty may have been granted to them; for no person is permitted to have his name registered (and consequently not allowed to vote) until he has taken an oath to the effect that he has not, after arriving at the age of eighteen years, voluntarily been engaged in rebellion against the government. That class of persons who voluntarily bore arms, and to whom an amnesty has been granted, certainly cannot take that oath, because they cannot swear without qualification that they have not, after arriving at the age of eighteen years, voluntarily borne arms against the United States; and unless they do so take it, they cannot vote. The requirement, therefore, that it shall be taken by all persons without exception, is equivalent to a direct enactment that that class of persons shall be deprived of the right of suffrage which is conferred upon them by the Constitution.

The form of the law by which an individual is deprived of a constitutional right is immaterial. The test of its constitutionality is, whether it operates to deprive any person of a right guaranteed or given to him by the Constitution. If it does, it is a nullity—whatever may be its form. Surely, a law which deprives a person of a right by requiring him to take an oath which he cannot take is no less objectionable than one depriving him of such right in

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direct terms. To make the enjoyment of a right depend upon an impossible condition, or upon the doing of that which cannot legally be done, is equivalent to an absolute denial of the right under any condition. The effect, and not the language of the law in such case, must determine its constitutionality. It would not be doubted for a moment, that a law expressly denying the elective franchise to any person upon whom the Constitution confers it, would be unconstitutional. Why, then, is a law less objectionable which, although not expressly and directly, yet no less certainly, denies the right? No law can be framed which will more effectively deprive that class of persons who, after arriving at the age of eighteen years, voluntarily bore arms against the United States, and to whom an amnesty has been granted, of the right of suffrage, than the oath required by the registry law. Why, then, is it not as much in conflict with the Constitution, and as obnoxious to it, as a law which in direct terms deprived that class of the elective franchise? In our judgment it is—and being so in conflict with the fundamental law, the oath is a nullity.

But it is argued, no amnesty has been granted—and hence, no person, who by the Constitution is entitled to the elective franchise, is deprived of it by means of the oath required by the law. This, however, appears to us to be an error. On the fourth day of July, 1868, a proclamation, the conclusion of which is in this language, was issued by the President:

“Now, therefore, be it known that I, Andrew Johnson, President of the United States, do, by virtue of the Constitution, and in the name of the people of the United States, hereby proclaim and declare, unconditionally and without reservation, to all and every person who, directly or indirectly, participated in the late insurrection or rebellion—excepting such person or persons as may be under presentment or indictment in any Court of the United States having competent jurisdiction, upon a charge of treason, or other felony—a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war—with restoration of all rights of property, except as to slaves, and except also, as to any property of which any person may have been legally divested under the laws of the United States.”

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The relator shows by his affidavit that he is possessed of all the electoral qualifications required by the Constitution; but that, by reason of his having participated in the late rebellion, he cannot take the oath required by the registry law. He also avers that he has not, at any time, been under presentment or indictment in any Court of the United States, upon any charge of treason or other felony—thus bringing himself fully within the terms of the proclamation above quoted.

It is, however, claimed that the President had not the power to grant amnesty as was done by this proclamation; that amnesty can only be granted by an Act of Congress. To sustain this position it is argued that the constitutional power to pardon, which is given to the Chief Magistrate, does not include the right to proclaim amnesty. But the word "pardon" is generic, and includes every character of pardon. Amnesty is a general pardon granted to a class of persons by law or proclamation. The Act in such case is as properly a pardon as if simply granted to an individual, by deed. Indeed, it seems to be generally conceded, in the United States, that the word "pardon" includes amnesty. Thus, Mr. Webster defines the latter word to be, "an act of oblivion; a general pardon of the offenses of subjects against the government, or the proclamation of such pardon." So, Worcester defines it as "a general pardon, granted to those guilty of some crime or offense."

Amnesty, being a kind of pardon, must be held to be included in the constitutional power conferred upon the President to grant pardons—hence, this proclamation must be accepted as a valid and operative grant of amnesty to all those who may be included within its language.

Here, then, it appears that the relator, who has shown himself possessed of all the qualifications required by the Constitution to entitle him to the elective franchise, is deprived of that right by means of the oath required by the Registry law. This being the case, the oath is unconstitutional, and the relator cannot be compelled to take it.

No part of the oath, it is true, appears to be in conflict with the Constitution, except that which requires the citizen to swear that he has not, since arriving at the age of eighteen years, voluntarily

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borne arms against the United States, nor held any civil or military office under the Confederate States. Still, as the registry agents have no right or power to alter or modify the oath, but are compelled to administer it entire, and to all persons who make application to have their names placed on the Register—a part of it being open to constitutional objection, the entire oath must fall.

The mandamus to the defendant, commanding him to register the name of the relator, was properly issued by the Judge below, and his order must be affirmed.

By JOHNSON, J.: I dissent.

J. BROWN *et al.*, RESPONDENTS, v. J. E. JONES, APPELLANT.

PROVINCE OF JUDGE AND JURY—REDUCTION OF VERDICT BY JUDGE. In an action on an injunction bond the Judge instructed the jury to consider certain items of alleged damage, which should not have been considered; and in deciding a motion for a new trial, endeavored to correct the error by reducing the verdict and confining it to the amounts claimed upon the counts by him considered good: *Held*, that this was assuming the province of the jury, and could not be done.

DAMAGES ON INJUNCTION BONDS. The actual expense and loss occasioned by a writ of injunction are a proper subject of consideration in a suit on the injunction bond, including the costs of the original proceeding, the reasonable counsel fee paid, agreed to be paid or liquidated, for setting aside the injunction, and such other damage as is the natural and proximate consequence of the issuance and enforcement of the writ, and no more; nothing, generally, can be included which is not the actual, natural, and proximate result of the injunction.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The complaint sets forth that on July 24th, 1868, the plaintiffs, J. Brown and J. Hamilton, were the owners and in the possession of three hundred and fifty cords of wood, worth one thousand two hundred dollars, on a wood ranch in Washoe County; that on that day one J. S. Peck commenced an action against them, and pro-

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cured an injunction to be issued out of the Third District Court, restraining them from removing the wood, to which writ they yielded due obedience: that in said action an injunction bond was given in the sum of one thousand dollars, with the defendants, J. E. Jones and L. Rawlings as sureties; that afterwards the injunction was so modified by judicial action as to allow the removal by the plaintiffs in this action of all the wood cut prior to July 10th, 1868; that the plaintiffs by reason of the injunction were damaged to the extent of one hundred dollars for counsel fees paid to procure the dissolution of it; two hundred and fifty dollars for the prevention, by reason of the injunction, of their being able to fulfill a contract to deliver wood in Washoe City; two hundred and fifty dollars by reason of their cattle and wagons being thrown out of employment; three hundred and fifty dollars for deterioration in the market price and value of the wood during the time of the injunction, and one hundred dollars damages by reason of necessary repairs to a road completed by plaintiffs at the time of the issuance of the writ and destroyed before the modification of it, besides injury to their credit occasioned by the injunction. The jury returned a general verdict in favor of plaintiffs for nine hundred and twenty-seven dollars.

The defendant J. E. Jones made a motion for a new trial; upon which the Court below rendered a written opinion and decision, concluding as follows:

“ It follows, from the foregoing considerations, that the plaintiffs are entitled only to the damages alleged to have been sustained by reason of moneys paid for counsel fees and the loss by waste and depreciation in market value of the wood. There is no criterion by which the verdict can be subdivided so that the intention of the jury can be certainly made out in the absence of special findings. I think, however, that the presumption may be properly entertained that the plaintiffs are entitled to such amount as they proved, not exceeding the amount named and claimed in the complaint, to wit, one hundred dollars counsel fees, one hundred and seventy-five dollars damage by waste, and one hundred and seventy-five dollars loss in market value, together amounting to four hundred and fifty dollars, coin. The order of the Court must be that the verdict of the

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jury must be set aside and a new trial herein be granted, unless the plaintiffs shall within five days from and after the filing this opinion and order consent to enter written formal satisfaction of the existing judgment to the extent of four hundred and seventy-seven dollars, leaving a judgment of four hundred and fifty dollars and costs still unpaid and unsatisfied, or shall consent to have the present judgment vacated and take judgment for four hundred and fifty dollars and the costs accrued up to the date of filing this order. And it is further ordered, that in case of acceptance of either the above terms by the plaintiffs, the costs of such entry of satisfaction, or vacating, and entry of new judgment, shall be at the cost of the plaintiffs. And in case of such entry of satisfaction or taking new judgment in lieu of the present one, the clerk shall, upon request of plaintiffs, issue execution upon such judgment for not to exceed four hundred and fifty dollars and costs accruing to this date herein, all in gold coin."

Defendant Jones appealed from the judgment and the order.

W. L. Knox, for Appellant.

W. M. Boardman, *W. C. Kennedy*, and *T. D. Edwards*, for Respondent.

By the Court, WHITMAN, J.:

This action is upon an injunction bond for one thousand dollars. It appears that the original injunction was modified in a very important particular, which, to that extent, was a decision that the writ was so far improperly granted, so respondents were entitled to their action, but their complaint presents several counts for damage which could not properly be considered under the terms of the bond, which is the ordinary statutory undertaking.

The District Judge was not sufficiently particular in instructing the jury, and allowed them to consider some items of alleged damage which should have been withheld. In deciding the motion made by appellants for a new trial he endeavors to correct the error by reducing the verdict of the jury, and confining it to the amounts claimed upon the counts by him considered good. This cannot be

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done; it is assuming the province of the jury. It might be the jury gave the whole verdict upon one erroneous count; for here no presumption can arise that the verdict was based upon the good counts, to the exclusion of the bad, as the amount found exceeds the aggregate claimed upon the counts held good by the Judge below by more than one-half.

The complaint is not, as claimed by appellants, entirely devoid of a cause of action; but it is so uncertain, that it should be amended to show with distinctness that the alleged damage resulted from that portion of the injunction dissolved, when, upon proper proof, respondents would be entitled to recover the actual expense and loss occasioned by the writ of injunction in this particular in which it was vacated. This would include the costs of the original proceeding, the reasonable counsel fee paid, agreed to be paid, or liquidated, for setting aside the injunction, and such other damage as the natural and proximate consequence of the issuance and enforcement of the writ, and no more.

It is difficult to define specifically, in the way of a rule, what would not be included as matter of damage. Of course, generally, nothing which is not the actual, natural, and proximate result of the wrong; and with respect to the pleadings at bar, it may be said that no recovery could be had by reason of the cattle and wagon being thrown out of employment, nor for the expense of making a road, nor for injury to the credit of respondents.

The judgment is reversed and the cause remanded.

5	377
23	315

THE STATE OF NEVADA, RESPONDENT, v. T. S. GARDNER, APPELLANT.

CRIMINAL LAW—ISSUANCE OF FALSE LICENSE. Where a Deputy Sheriff having brought suit against certain persons for doing business without license, upon their settlement of the suit by paying costs and amount of license, gave them a paper written by his attorney and signed by himself purporting to be a license; and it appeared that he had no proper forms or blanks at the time, and that there was no fraud or fraudulent intention on his part further than indicated by the mere naked act: *Held*, that no criminal offense was com-

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mitted under the statute making the issuance of such license felony. (Stats. 1864-5, 299, Sec. 74.)

CRIMINAL INTENT NECESSARY TO CONSTITUTE CRIME. The essence of a criminal offense is the wrongful intent, without which it cannot exist.

THE LETTER OF CRIMINAL STATUTES AS OPPOSED TO THE REASON. While the words of a criminal statute are the primary guide to its meaning, it is well settled that to authorize a conviction under it the case presented must not only come within its words, but also within its reason and spirit, and the mischief it was intended to remedy.

STATUTE AGAINST ISSUANCE OF FALSE LICENSES. The Legislature, in passing the statute against the issuance of licenses other than those properly issued to the Sheriff, (Stats. 1864-5, 299) did not intend such fearful consequences as a conviction for felony, and imprisonment in the State prison, upon the violation merely of the letter of the statute; and in a prosecution under it, a charge to the jury which entirely ignores any question of criminal intent is error.

APPEAL from the District Court of the Sixth Judicial District, Washoe County.

H. M. Steele, for Appellant.

R. M. Clarke, Attorney-General, for Respondent.

By the Court, **WHITMAN, J.:**

Appellant was indicted, tried, and convicted of a felony, under a statute of this State which provides that: "If either the County Treasurer, County Auditor, Sheriff, or any other person, shall issue, have in his possession with intent to circulate, or put into circulation, any other license than those properly issued to the Sheriff under the provisions of this Act, the person so offending shall be guilty of felony, and on conviction be sentenced to imprisonment in the State prison for a term of not less than one year nor more than four years." (Stats. 1864-5, 299, Sec. 74.)

The undisputed facts in evidence were that appellant as Deputy Sheriff and Collector of Licenses, had brought suit as by statute authorized against certain merchants doing business within his county without license; that they had settled the suit by paying costs and amount demanded for license, and thereupon, he having no proper forms, had given them a paper written by his attorney, and signed by himself, purporting to be a license. There was no pretense of any fraud, or fraudulent intention on his part, further

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than indicated by the mere naked act. On the contrary, the District Judge trying the cause was so much impressed with the hardship of the case, that he combined with his sentence of one year's imprisonment in the State prison an earnest recommendation that appellant be pardoned, and restored to all the rights of citizenship, at the earliest possible moment.

This statement suggests an anomaly, opposed alike to reason, justice, and law. The error of the case consists in the too narrow view taken of the statute in question. The District Judge, while apparently regretting the necessity, felt himself compelled to construe the statute literally and technically, without reference to the general principles of criminal law. Thus he says in his charge to the jury: "When any person presumes to license such business transactions, otherwise than as the law directs, he is a breaker of the law, * * * the chief question being whether he issued the license described in the indictment. The gist of the offense charged is the *issuance* of the license as charged. * * * If, therefore, in considering the evidence and the law given you in Court, you find the defendant, T. S. Gardner, did issue a license other than one properly issued to the Sheriff under the provisions of the law I quoted to you in opening this charge, to N. J. Salisbury & Co., and at the town of Wadsworth, in the County of Washoe, State of Nevada, and did take and receive therefor the sum of seven dollars and fifty cents, as charged in the indictment, you will render a verdict of *guilty as charged in the indictment*." The italics are as in the record. The indictment charged a wilful, felonious, and fraudulent issuing.

It may be remarked here that receiving the money is no portion of the offense created by statute, and it is not impossible that the indictment is bad by reason of containing matter relative thereto, which may allege a separate and distinct offense under the same statute, but as this case presents a broader ground for decision, let it rest on that. It will be observed that any question of intent is carefully ignored as the Judge gave the law to the jury. He should rather have instructed thus: "Nothing short of the intent to do a forbidden thing will make a man criminal. Where such intent is wanting he commits no offense in law, though he does acts

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completely within all the words of a statute which prohibits the acts, being silent concerning the intent. And there are cases in which something even more than this is necessary. For example: the English Statute 12, Geo. III, C. 48, Sec. 1, makes it felony to write any matter or thing liable to stamp duty upon paper upon which had previously been written some other matter so liable, before the paper has been again stamped, but makes no mention whether the intent must be a fraudulent one or otherwise. Yet it was ruled by Abinger, C. B., that the offense is not committed unless the intent is fraudulent. The doctrine is, that the statute is to be so construed in connection with the common law, which requires an evil intent to accompany the evil act, as to add in favor of the defendant this provision." (1 Bishop on Criminal Law, 3d Ed. 429.)

It would be monstrous that one guilty of no evil intent should incur the odium of proven felony; if such is the law, better be remitted to lawlessness. As is well remarked by the author above quoted: "It is therefore a principle of our legal system, as probably of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." (1 Bishop on Criminal Law, 3d Ed. 370.)

While the words of a statute are the primary guide to its meaning, it is a well settled principle of criminal law that a given case must come not only within the words of a statute, but also within its reason and spirit, and the mischief it was intended to remedy; and so it is said that in favor of defendants: "Criminal statutes are both contracted and expanded." (1 Bishop on Criminal Law, 3d Ed. 259 and 272; 2 Leading Crim. Cases, 2d Ed. 178 and 181, Notes.)

Viewing the statute under consideration in the light of the general criminal law, it is impossible to believe that the Legislature proposed such fearful consequences upon the violation merely of the letter of the statute, and in so deciding the District Judge erred. For the error indicated, the judgment is reversed, and the cause remanded.

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By LEWIS, C. J.:

I am compelled to dissent from the doctrine of the principal opinion in this case. The intent which is spoken of by authors and Judges as essential to constitute a crime is not necessarily an evil or wrongful intent beyond that which is involved in the doing of the prohibited act. That there will be no crime when the act which is made a crime is not intentionally or willfully done is undoubted; and it seems to me that it is equally clear that the willful doing of an act prohibited by the Legislature completes the offense without anything else being shown. Here, for example, the law makes it criminal for a person to issue any but such licenses as are properly delivered to the Sheriff by the Auditor. Is not the crime complete, when it is shown that a license not so issued to the Sheriff is put in circulation? What other intent can be required than the intent to issue a license other than such as is authorized by the statute? Must there be a showing not only that such license was issued, but also that it was issued with the intent to defraud the revenue? The statute does not make such intent an ingredient of the crime; if the Courts do it, they do not interpret, but mutilate, the law.

Cases of a similar character have frequently been before the Courts, and I think it is very generally held that the crime is complete when the act constituting the crime is shown to have been done, regardless of the intent with which it was done. Thus, in *The State v. Walls*, (7 Blackford, 572) where the defendant was indicted for carrying a concealed weapon under a statute making such act a crime, it was held that the fact that the weapon was carried simply for the purpose of exhibiting it as a curiosity, and not with any evil intent or purpose, constituted no defense. In that case there was certainly none of the evil mind which Mr. Bishop assures us must be an ingredient of every offense. Again, the *Brig Ann* (1 Gallison, 62) is another case strongly refuting the learned author's dictum. An embargo had been laid on the ports of the United States. The brig was libeled for a violation of the embargo. But it was shown that the master did not know of the embargo, and that it was impossible for him to have known it at the time he sailed, because the news of the passage of the Act could

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not have reached the port whence he sailed—he having sailed from Newburyport on the day following the passage of the law by Congress; but this utter ignorance of the fact that the act which he was doing was prohibited, and even the impossibility of knowing it, was held no defense.

So in *Regina v. Woodrow*, (15 Meeson & W. 404) upon a statute which imposed a penalty of two hundred pounds upon any person having in his possession adulterated tobacco, it was held in the Court of Exchequer that the defendant was amenable to the penalty, although it appeared that he purchased the tobacco as genuine, and had no knowledge or cause to suspect that it was adulterated. It is, also, well known that all Acts of Parliament take effect from the first day of the session, even if not adopted until the last day; and thus a person may be engaged before and during the session in the doing of an act entirely innocent, but at the last day an Act is passed making it criminal, and thus he may be indicted and convicted for doing that which was entirely innocent, morally and legally, when done. Such cases have frequently occurred, and still that fact has never been held by the English Judges to be a defense, on the ground that there was no evil mind or intent, although there certainly could not be at the time the act was done. The method pursued in such cases has always been to petition the Executive to pardon the offender, and not to add to or take from the law.

The cases referred to by Bishop, in support of his doctrine, that there must be an evil purpose other than that resulting from the willful doing of the act prohibited, before one can be guilty of a crime, generally do not support the text. They simply hold that there must be a willful or intentional doing of the act itself. As for example, the case of *Myers v. The State of Connecticut*, (1 Conn. 502) where the defendant was indicted for letting a carriage on the Sabbath under a statute prohibiting such act, except when it was to be used for charity or from necessity, the showing that the defendant was informed and believed that the hiring was for a charitable purpose was sufficient proof that he did not willfully or intentionally violate the statute, or do the prohibited act. Such is, however, not this case. It can hardly be said that the defendant

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did not intentionally or willfully do the very act prohibited by the statute.

The defendant in this case may be morally as innocent as if he had not done the act at all, and for this reason he should and doubtless would be pardoned were the penalties of the law enforced against him by the Courts. That is the better method and most proper time for the interposition of compassion against what seems the harshness of the law.

I am constrained to dissent from the majority opinion.

HENRY MAYENBAUM, APPELLANT, v. THOMAS J. MURPHY AND JOSEPH E. MARCHAND, RESPONDENTS.

SERVICE OF SUMMONS IN COUNTY WHERE BEFORE SERVED OUT OF COUNTY. Where there were two defendants in an action, and both were served with the summons in a district different from the one in which the suit was commenced, and before the forty days allowed to answer expired, one of the defendants entered the county and was served there; and after ten days from such service, but before the expiration of the forty days, default was entered against the person so served in the county, and judgment by default rendered against defendants, to be executed against their joint property and the separate property of the defendant served in the county: *Held*, that the second service was a nullity, the default irregular, and the judgment error.

PRACTICE ACT, SECTION THIRTY-TWO—JUDGMENT AGAINST JOINT DEBTORS. Where the defendants in an action against two are both served with the summons, a judgment, under section thirty-two of the Practice Act, cannot be entered against one to be executed against his separate property and the joint property of both.

SUMMONS ONCE FULLY SERVED. Where service of a summons has been made, and the demands of the writ satisfied, the conclusive presumption of the law is, under sections twenty-eight and thirty-three of the Practice Act, that its office, having been accomplished, no person can effectively thereafter use it for its original purpose.

SECOND SERVICE OF SAME SUMMONS. Where a summons has been served upon a defendant out of the district and afterwards served upon him in the district, with the intention of shortening the time allowed him to answer: *Held*, that the second service was an absolute nullity.

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APPEAL from the District Court of the Sixth Judicial District, Lander County.

The facts are stated in the opinion.

D. Cooper, H. Mayenbaum and Clarke & Wells, for Appellant.

I. The right to take judgment upon failure to answer is indisputable. (Practice Act, Sec. 152.) Judgment taken, relief can be granted only in the cases prescribed by statute, to wit: mistake, inadvertence, surprise, or excusable neglect, (Practice Act, Sec. 68) and then only upon affidavit "showing good cause therefor." The affidavit must show good or legal excuse. In the case at bar the excuse offered is, that "affiant never for one moment dreamed that such service [service in Lander County] could or would require him to appear and answer in said case at any other or different time than the time specified in the summons served on him at White Pine aforesaid." Therefore, ignorance of the requirements of the summons served in Lander County is the excuse urged and mistake relied upon to set aside the judgment. But this is ignorance of the law which is inexcusable. (*Chase v. Swain et al.*, 9 Cal. 130.) It is clear, therefore, that the Court below erred in setting aside the judgment for the cause shown.

II. Is this error reviewable? If error beyond a reasonable doubt, clearly so, for then it amounts to abuse of discretion. (29 Cal. 422.)

Garber & Thornton and N. D. Anderson, for Respondents.

I. The reason, and as we conceive, the true construction of the law should be, that the summons having once been served on both defendants in White Pine County, it had answered its purpose, the power of the writ had been exhausted, and that the second service of the writ on Marchand in Lander County was simply a nullity. Certainly, to allow a plaintiff to serve a summons again and again on a defendant can only lead to confusion and mistake; the defendant being cited to appear on two inconsistent days, would be in doubt as to the correct time for him to appear in the action, and

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he might very naturally think he was entitled to the longest time mentioned. Immediately upon hearing that a default had been entered on this service, he applied to the Court to set it aside. He did not sleep on his rights, but made the application at the same term of the Court, within a few days after the default and judgment had been entered, and before the time for him to answer as first cited had expired. The answer proposed, and his two affidavits show, a good and meritorious defense. The Court below was right in its ruling. (*Roland v. Kreyenhagen*, 18 Cal. 456; *McKinley v. Tuttle*, 34 Cal. 237; *Howe v. Independent Co.*, 29 Cal. 72; *Howe v. Coldren*, 4 Nev. 173.)

II. The Court below, in its discretion, saw proper to set aside the default as to Marchand, and the judgment as to both defendants. This is a discretion that the Appellate Court will not interfere with, unless in cases of great abuse. (*Bailey v. Taafe*, 29 Cal. 424.)

No Court could refuse relief in such a plain case as this. It is stronger than any one to be found in the books where such relief has been granted. For the Court below to have refused it would have been such a manifest abuse of its discretion that the Appellate Court would have granted it, had it been refused.

III. The judgment was entered under section thirty-two of the Practice Act, but in direct conflict with that section. Both defendants were served in White Pine County; afterwards, the defendant Marchand was again served in Lander County, his default entered, and a judgment entered under this section against the joint property of both defendants, and the separate property of the defendant Marchand. No such judgment as this can stand. Had the defendant Murphy not been served there might have been some show of reason in entering such judgment; but he having been served, the Court had no power to enter judgment against him until his legal time for answering had expired. This form of judgment can only be entered where the defendants are jointly liable and one of them not served. If served, all must be included in the judgment; and no judgment can be entered until the time for all to answer, who have been served, has expired. (*Bullion Mining Co. v. Cræsus*

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Co., 3 Nev. 337; *Keller v. Blasdel*, 1 Nev. 493; *Keller v. Blasdel*, 2 Nev. 163; 1 Chitty's Plead. 44; *Stearns v. Aguirre*, 7 Cal. 447; *Stearns v. Aguirre*, 6 Cal. 176; *Lewis v. Clarkin*, 18 Cal. 400; *People v. Frisbie*, 18 Cal. 402; *Clafin v. Butterby*, 5 Duer, 327; *Brumskill v. James*, 1 Kern. 294; *Jaques v. Greenwood*, 1 Abb. Pr. 230; *Slayter v. Smith*, 2 Bos. 674.)

IV. Even had the default not been taken through the mistake, inadvertence, surprise, and excusable neglect of Marchand, as it is clearly shown that it was in this case, still the judgment would be irregular and should be set aside; in fact, it is more than irregular—it is void. (*Keller v. Blasdel*, 2 Nev. 163.)

The idea that Murphy, who was served and ready to answer in time, can have a judgment entered against his joint property with Marchand, under section thirty-two of the Practice Act, is absurd. The judgment so entered is absolutely void; nor could a separate judgment be entered against Marchand on the default, for the reason that both defendants were sued jointly on a joint indebtedness. The interposition of a defense by Murphy, if successful, would defeat the whole action.

By the Court, WHITMAN, J.:

Appellant filed his complaint against respondents in the District Court of the Sixth Judicial District, County of Lander, seeking to recover from them seven thousand dollars as an attorney's fee. On the sixteenth of August, 1869, summons was issued by the Clerk of the Court, which was forwarded to White Pine County, in the Eighth Judicial District, for service. On the fourth day of September this summons was served on both the respondents. Subsequently, on the eighteenth of September, the same summons was served on respondent Marchand in Lander County. Upon the thirtieth of the same month, in open Court, the default of Marchand was entered, and upon proofs made, a judgment was recovered against both respondents, with right of execution against the separate property of Marchand, and the joint property of Marchand and Murphy. At the same term of the Court, motions were made to vacate the judgment against Murphy, and to set aside default,

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and vacate the judgment against Marchand. These were considered together, and the entire relief demanded was granted. This is assigned as error.

There was no authority for the judgment against Murphy; he had been regularly served with summons, and by its terms, and under the statute, had forty days therefrom to answer, which time had not expired when judgment was taken against him. The Code provides that: "When the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: First, if the actions be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the Court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or second, if the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants (Stats. 1869, 202, Sec. 32); but such was not this case. Murphy was served, and no judgment could regularly be entered against him as affecting his property, whether joint or several, until his time for answer had expired, save by his consent. Therefore, the judgment against him was properly vacated.

If the second service upon Marchand was valid, it may well be doubted whether the default should have been set aside, provided any judgment could properly have been rendered against him on such default, before his codefendant, jointly liable, had defended, or refused or neglected to defend; but these are grave questions of practice, unnecessary to be decided under the view taken of such second service. The statute provides, that "the summons shall be served by the Sheriff of the county where the defendant is found, or by his deputy, or by any citizen of the United States over twenty-one years of age; and except as hereinafter provided, a copy of the complaint, certified by the Clerk, or the plaintiff's attorney, shall be served with the summons. When the summons shall be served by the Sheriff, or his deputy, it shall be returned with the certificate or affidavit of the officer of its service and of

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the service of the copy of the complaint, to the office of the clerk of the county in which the action is commenced." (Stats. 1869, 200, Sec. 28.) So that, full service having been made and the demands of the writ satisfied, the conclusive presumption of law is, that such writ is returned to the Clerk's office of the Court in which the suit is pending. It has no business anywhere else; its office is accomplished, and no person can effectively thereafter use it for its original purpose.

Whether an *alias* summons could be issued by attorney or clerk, and served upon a defendant already served, so as to reduce the time of appearance, is another and perhaps entirely different question. That this summons was properly served in the first instance, is evidenced by the return of the Sheriff.

Take section thirty-three, which reads: "Proof of service of the summons shall be as follows: 1st. If served by the Sheriff, or his deputy, the affidavit or certificate of such Sheriff, or deputy," etc., in connection with section twenty-eight, previously quoted, and there is no doubt that, so far as this matter of service is concerned, the Sheriff, or deputy serving, is to that extent the officer of the Court where the action is pending, and thus to be recognized. This summons, then, having been properly served, should have been returned. If returned, such fact should have been noted in the register; and the paper itself should have remained upon the files of the Clerk of Lander County; and in either or any event, no defendant could be damaged by official laches.

Therefore, the second service was an absolute nullity; and Marchand was not thereby called upon to answer, otherwise than under the original service. Wherefore, the default entered against him was irregular; and was properly, with the judgment thereon entered, set aside.

The order of the District Court is affirmed.

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RESULTING TRUST—PURCHASE OF LAND BY ONE, CONSIDERATION BY ANOTHER.

Where an estate is purchased in the name of one person and the consideration is paid at the time by another, there is a resulting trust in favor of the latter; but to establish such trust the evidence that the consideration was so furnished must be clear.

TIME OF ADVANCING CONSIDERATION TO CREATE RESULTING TRUST. To establish a resulting trust in favor of a person advancing the consideration for a purchase of land in the name of another, the consideration must be shown to have been advanced at the time the title was acquired; as the trust must be created at the very time the title passes, and no subsequent transaction being allowed to impress the character of a trust estate upon that which was absolute in the purchaser at the time it was acquired.

RESULTING TRUST—ADVANCE OF CONSIDERATION IN CHATTELS. Where Wolfe and Frederick agreed with Stowe to purchase land of him for five hundred dollars, each to have an undivided half, and Wolfe accepted from the agent of Frederick at the time a watch in lieu of one hundred and seventy-five dollars of the purchase money, and other chattels for the purpose of selling them and making up the balance of two hundred and fifty dollars, and took the deed of the land in his own name, canceled a debt due him by Stowe in payment thereof, and sold the chattels and made up the balance: *Held*, that there was a resulting trust for one-half the land in Wolfe in favor of Frederick.

EVIDENCE TO SHOW RESULTING TRUST. To establish a resulting trust in favor of one furnishing the consideration for land purchased in the name of another, it is enough for the *cestui que trust* to show an agreement on the part of the trustee to purchase, and that the consideration was furnished to him before he acquired the title.

PRINCIPAL AND AGENT—ADVANCE BY AGENT FOR BENEFIT OF PRINCIPAL. If an agent advance his own money or property for the benefit of his principal, and the principal ratify such advance, the transaction becomes a loan dating from the time of the advance, and the principal is entitled to the advantage of the advance the same as if it had been his own money or property.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The complaint in this action, which was against A. Haas, B. Wolfe, and L. Godchaux, composing the firm of A. Haas & Co., set out the purchase by defendants, in November, 1868, of a small lot of land, sixteen feet front on the west side of Main Street by seventy-five feet in depth, in Treasure City, White Pine County, for the sum of five hundred dollars; that it had been previously

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agreed that plaintiff was to furnish half the consideration money, which he did furnish, and defendants were to convey to him one-half the lot; that after the purchase defendants refused to convey to him, and afterwards in March, 1869, sold the lot for two thousand five hundred dollars; that it was then worth and might have been sold for three thousand two hundred dollars; and that defendants refused to pay plaintiff any part of the proceeds of sale, wherefore he demanded judgment against them for one thousand six hundred dollars.

The cause was tried before a jury, and the result was a verdict and findings in favor of the plaintiff against the defendants, A. Haas and B. Wolfe, for the sum of one thousand six hundred dollars. A motion for a new trial having been overruled, defendants took this appeal.

Garber & Thornton, for Appellants.

I. The law governing an action of this character is well settled. Plaintiff must show affirmatively that at the time of the purchase he paid the whole or some aliquot portion of the purchase money. Both as to time and fact of the payment, the burden of proof is on him, and he must sustain it by clear and indisputable evidence. (*Pinnock v. Clough*, 16 Ver. 500; *Conner v. Lewis*, 16 Maine, 274.) Taking every fact testified to by plaintiff's witness as true, he has failed to prove the essential fact, the contemporaneous payment by him of any part of the five hundred dollars for the premises in controversy. The most that can be claimed in any view of the testimony is, that he agreed, through his brother and agent, with Wolfe, acting for Haas & Co., verbally, that Wolfe should buy the lot for the joint benefit of plaintiff and defendant; that Wolfe did buy it from Stowe for five hundred dollars; that the five hundred dollars was paid by Haas & Co. to Stowe by canceling that amount of indebtedness then existing and due from Stowe to Haas & Co. No money was ever paid to Stowe except by a credit to him in his debt to Haas & Co., made at the time of the purchase. The only advance pretended to have been made by plaintiff was at least a week afterwards. Consequently a payment by plaintiff

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at the time of the purchase is not shown. (See *Graves v. Durgan*, 6 Dana, 331.)

II. Again, as there was no writing, the Statute of Frauds applies. If Haas & Co. had at the time of the purchase the watches or other property or funds of the plaintiff in their hands, under an oral agreement to use them in this purchase, still if as a matter of fact they did not use the funds of plaintiff but only their own in the purchase, the plaintiff cannot claim a trust in the land. (2 Spencer's Equitable Jurisdiction, 203, *et seq.* and cases cited; *Taylor v. Plummer*, 3 Miss. 574; Spencer's Eq. Jur. 205; 15 Vesey, 517; Levison on Trusts, 205; *Lamas v. Baily*, 2 Ver. 627; *Lane v. Bighton*, 1 Ambler, 413; 2 Story's Eq. Jur. § 1210; Dart on Vend. & Pur. 441; *Robles v. Clarke*, 25 Cal. 326.) Haas & Co. were under no legal obligation to invest plaintiff's money in this land. If there was any trust it was an express trust, and being in parol void of credit.

III. The receipt of money from the watches will not raise the trust, any more than would the giving of a note to the alleged trustee for the purchase money, which note was afterwards paid. (2 Story's Eq. Juris. § 1201, *a.*)

IV. If there was a resulting trust it resulted to M. M. Frederick and not to plaintiff. If so, plaintiff cannot maintain this action without a written assignment of the trust from his brother. (*Stafford v. Lick*, 13 Cal. 242; *Dupont v. Wertheman*, 10 Cal. 367; *Johnston v. Wright*, 6 Cal. 375; *Washburn v. Allen*, 5 Cal. 464; *Fisher v. Salmon*, 1 Cal. 414; *Mudgett v. Day*, 12 Cal. 140; *Padgett v. Lawrence*, 10 Paige's Ch. 170; *Batsford v. Burr*, 2 Johns. Ch. 414; *Shelton v. Shelton*, Ibid, 408; 5 Johns. Eq., N. C., 106; *Irwin v. Ivers*, 7 Ind., Porter, 308; *Gibson v. Foote*, 4 Miss. 729; *Kendall v. Mann*, 11 Allen, Mass., 18; *Loyed v. Lynch*, 28 Penn. 43; *Kissler v. Kissler*, 2 Watts, 323; *Robertson v. Robertson*, 9 Watts, 34; *Sidle v. Walters*, 5 Watts, 389; 2 Kent's Com. 438; *Colton v. Missing*, 1 Maddocks, 176; *Allen v. Cowan*, 28 Barbour, N. Y., 104.)

V. Even if the watches were made a gift by M. M. Frederick

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to plaintiff, and even if a subsequent acceptance were proved, it would not be sufficient, for a resulting trust cannot arise by acts subsequent to the purchase. The purchase money must have belonged to plaintiff *at the time*. There is no case where the doctrine of relation has ever been applied to resulting trusts. And it should not. It would give to the plaintiff a perilous advantage by taking his election after a rise in the value of the property.

VI. It is admitted that Wolfe had the watches; but the point is whether he had them as payment on this lot, or to sell on commission. It is certainly not shown by clear and undisputed evidence that he had them as payment. The weight of testimony on the contrary is clearly in favor of defendants. Would it not be a most dangerous doctrine to allow the title to real estate to be diverted on such a showing as plaintiff has made? He cannot invoke the principle that the Appellate Court will not interfere in case of conflicting evidence, for on authorities and principles, the very fact that the testimony is conflicting, not clear and indisputable, is fatal to his action.

Tilford & Foster, for Respondents.

I. The plaintiff did show by clear and indisputable evidence that at the time of the purchase he paid the whole or some aliquot portion of the purchase money. He did, by his agent, at the time the agreement was made to purchase together, pay one hundred and seventy-five dollars to the defendants as a part payment on his part of the lot, and gave them property of the value of the balance due, to be sold and applied, which was afterwards sold by them for that amount. This was before the purchase was completed; no deed had yet been executed, and until the deed was executed no purchase can be said to have been made. As a matter of fact the purchase was made by plaintiff, and Wolfe was let in afterwards, and therefore, when the agreement was made between plaintiff and defendants it was that defendants should take one-half off plaintiff's hands. In this view it would make no difference if the money had not been paid till long afterwards, or till the deed from Stowe was

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executed. The cases cited by appellants are founded on facts different from those presented here.

II. Suppose the lot had become valueless, and Frederick had commenced suit to recover the sum of two hundred and fifty dollars, could Haas & Co. not have held that sum as a payment on that lot? It would have been a good defense, that when they received such sum it was to become a part payment on Stowe's debt to them. It was not intended by the parties that any of this identical money should go to Stowe, but it was paid and received as so much money on the Stowe debt, and the lot was the consideration. In the case supposed, they would claim that it operated as a credit to Stowe at the time of the payment. Though it is insisted that the whole of the money paid was that of Haas & Co., we think they had received our money, which amounted to the payment of Stowe's debt, and that in law it is the same as if so many twenty-dollar pieces belonging to plaintiff had been paid to Stowe. (*Robles v. Clark*, 25 Cal. 327.)

III. Was there any trust created to M. M. Frederick, and not to plaintiff? In the cases cited on this point by appellants, the authority to perform the act was questioned by the principal. Here, the principal has accepted and ratified the acts of the agent, and is now endeavoring to compel a performance of the contract made by his agent. The plaintiff having acquiesced in and ratified the acts of M. M. Frederick, that makes at least an implied agency, which is sufficient for our purpose. (Story on Agency, Secs. 45, 46, and 54, and cases cited.) The acts of the agent are the acts of the principal so long as he recognizes them. The most that could be said is, that there was an advance by the agent; and acting as such he had the right to make such advance, perhaps having other funds belonging to his principal in his hands. There being no proof as to whom the watches belonged to, the presumption is no stronger that the watches belonged to the agent, than if he had paid coin that it belonged to him.

IV. It is contended that there was a parol agreement shown by plaintiff, if anything was proven, to purchase the land in the name

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of defendants, which agreement created an "express trust," and was therefore void under the Statute of Frauds. Our statute is a copy of the California statute. In *Boyles v. Baxter* (22 Cal. 578) that point was directly passed upon, and it was held that such agreement did not make an express trust, as distinguished from one implied by law.

By the Court, LEWIS, C. J.:

There can be but little, if any, difference of opinion upon the abstract legal propositions discussed by counsel for appellants in this case. The difficulty, if any exist, is in determining whether the case at bar comes within the rules announced as the law. When an estate is purchased in the name of one person, and the consideration money is paid at the time by another, that there is a resulting trust in favor of the latter is a principle of equity jurisprudence than which none is more thoroughly settled; and the difficulty in cases of this kind does not arise from any uncertainty respecting the principle itself, but rather from the failure on the part of the *cestui que trust* to produce evidence satisfactory and sufficient to establish the fact that the consideration was in fact furnished by him. All the Courts require this to be clearly established. In this we agree with counsel; and furthermore, it must be admitted that the consideration must be shown to have been advanced at the time the title was acquired, so that the trust must be created at the very time the title passes—no subsequent transaction being allowed to impress the character of a trust estate upon that which was absolute in the purchaser at the time it was acquired. But when these facts are clearly established there can be no doubt but a trust will be raised.

Thus it only remains to determine whether the evidence brings this case within the rule. We think it does. M. M. Frederick, the plaintiff's agent, testifies that he wanted to buy the lot in question for his brother; and as he did not know the owner, he desired Wolfe, who was one of the firm of Haas & Co., to assist in finding him; this he did. When Stowe, the owner, was found, Wolfe said: "I wish to buy that lot of you." Stowe said: "I have promised it to somebody else." Wolfe replied: "I would like to get it";

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and Stowe answered: "You can have it for five hundred dollars." [Then Wolfe turned to me and said: "I have bought it for you for five hundred dollars."] After leaving Stowe, Wolfe said to Frederick that Haas & Co. would like to go into the speculation—that Stowe owed them some money, and they would take half of it. I told him I was buying the lots for H. S. Eisler and for my brother, and he might take the place of Eisler in the purchase of the lot. Then he goes on to say "that a week after this he went to the store of Haas & Co., and enquired of Wolfe if he had received a deed of Stowe, who answered that he had not." ["I gave him a gold watch at one hundred and seventy-five dollars, which he agreed to and did take as a payment of that amount on the lot, leaving a balance of seventy-five dollars to be paid for my one-half. Then I told him to take some silver watches to the amount of seventy-five dollars. He took these watches to sell. I was short of money, and therefore did not pay him money, but gave him the watches. I gave him the silver watches, and told him if he did not sell them for seventy-five dollars, I would send him a check for the amount when he executed a deed to my brother."] Again he says: "In March (four months after the purchase) I saw the defendant Wolfe; went into the store in Treasure City, and there saw Wolfe and one Leweson. Wolfe said: "What will you take for your interest in the Stowe lot?" No direct answer was made to the question. The following day it appears Wolfe positively refused to make a deed to the plaintiff, which appears to be the first time that his interest was denied, although Frederick and his attorney both testify that a deed had frequently been demanded prior to that time.

The witness Foster, who was the attorney for the agent of the plaintiff, testified: "About the tenth day of November I met Frederick in the street, in front of Haas & Co's store. He asked me to come in the store and draw a deed for him; he then introduced me to Wolfe, and said to him, this is an old friend of mine and has been my attorney. I want him to draw that deed for me for the Stowe lot. He, Wolfe, replied that he had not yet received the deed from Stowe." * * "It was then agreed that as soon as Haas & Co. got the deed from Stowe, that I was to draw the deed from Haas

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& Co. to Frederick. They then commenced talking about watches. I understood them to say that Frederick owed seventy-five dollars—though I would not be certain as to the amount. He had sold one watch to Wolfe which I understood was to be a credit on the lot; and also spoke of other watches to be left with them for sale. Frederick told Wolfe that if those watches were not sold when he received the deed from Stowe, to inform him of it and he would send him a check for the balance due on the lot.” He then testifies that he received several letters from Frederick desiring him to get the deed from Haas & Co., and that he demanded it; but they continued to make excuses and did not execute it. At one time when he demanded it, Wolfe said to him that he thought it better to keep the title in the name of Haas & Co., as the property was coming up, and he could sell it if an opportunity offered without waiting to get a deed from Frederick; and again, he said he would make it all right when Frederick returned. And in the month of December he testifies that he and Wolfe agreed to have some work done on the premises preparatory to fencing.

Another witness, D. M. Foster, testified that he heard Wolfe say he had bought another lot on speculation with Frederick, designating it as the Stowe lot.

One Pray also testified that Wolfe employed him to do some work on the premises in question—who spoke of it at the time as the Frederick lot. The bill for the work so done was afterwards presented to Frederick, and he paid it.

This is substantially the testimony on behalf of the plaintiff; and it must be admitted that it carries conviction with it, to the extent at least that Frederick has given a truthful history of the transaction. That he had an interest in the lot is a fact corroborated by the attorney, J. C. Foster, who relates conversations between Frederick and Wolfe respecting the matter, which are full of admissions of such interest; and also conversations between himself and Wolfe in which the admission is again made, and the frequent demand of a deed for the interest of Frederick with no denial of such interest, but rather a confession of it in the excuses given for not executing it. And again, the direct admission of Wolfe testified to by the other witness, (Foster) that the purchase was made by Frederick and him-

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self, and the payment of Pray, by Frederick, for work done on it at the request of Wolfe, are facts all strongly corroborating the testimony of Frederick, and establish the truth of his evidence beyond any reasonable doubt. All this testimony, it is true, is flatly contradicted by Wolfe. The jury, however, found against him, and were justified in doing so upon the clear weight of evidence. These facts must then be accepted as proven in the case: That Haas & Co. and the plaintiff agreed with Stowe to purchase the premises for five hundred dollars, each to have an undivided half; and that Wolfe accepted from the agent of the plaintiff a gold watch in lieu of one hundred and seventy-five dollars of the purchase money; and also took and agreed to sell other watches for the purpose of making up the balance; that this balance was realized by the sale of the watches is not disputed, but it is not shown when they were sold. However, it is argued that the evidence does not show that the plaintiff's money or property formed any part of the consideration paid to Stowe; that the watches were not delivered until after Stowe had been paid by Haas & Co. If this be true, clearly the plaintiff should not recover, for this is undoubtedly the essential fact to be proved—without proof of which the trust is not established. But we find nothing in the evidence to warrant the conclusion thus relied on by counsel.

True, it is shown that Stowe was indebted to Haas & Co., and that they did not intend to pay him any money for their interest; but it is not shown that he was indebted to them in the full sum of five hundred dollars, and that they simply gave him credit for the full sum. It cannot be presumed, without evidence, that Haas & Co. thus made themselves the creditors of Frederick without his request. Indeed, we have been unable to find any pretense of any such thing in the evidence, nor any warrant for presuming that such was the case. It is a fact the watches were not given to Haas & Co. until about a week after the contract of purchase with Stowe; but it is not pretended by any of the witnesses that any payment was made, nor any credit given to Stowe on the books of Haas & Co. before the deed was executed, nor that there was any agreement to do so. While on the other hand, it appears that the gold watch was sold to Wolfe for one hundred and seventy-five dollars,

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he to accept it as so much towards the payment of the lot, and the balance was to be paid by money which might be realized from the sale of other watches. Thus the watches were given to Wolfe as payment for the lot, payment not made to Wolfe for the lot, but given to him as the money which was to be given to Stowe. It does not seem to have been claimed on the trial that they were given to reimburse Haas & Co. for payment made by them for the plaintiff.

As we understand the testimony, the gold watch was sold to Wolfe. He, instead of paying its price to Frederick, was to pay it to Stowe; while the silver watches were left with the firm to sell, whereby they expected to realize the balance of the two hundred and fifty dollars. And as it was agreed if they were not sold when Stowe made the deed, he, Frederick, would forward the money; and nothing further appearing, it must be presumed they were sold before the deed was executed. That this took place before the deed was executed is undisputed; it must then, nothing appearing to the contrary, be presumed that the consideration was paid at the time the deed was executed, and at that time the plaintiff's property or money was in the hands of Haas & Co. to be employed as a payment to Stowe for his interest in the lot. The consideration money (for we must so consider the watches) from the plaintiff being thus in the hands of the defendants at the time they acquired the title, and taken by them to be used in securing title for the plaintiff, it must be concluded that it was employed in accordance with the mutual understanding of the parties. It is certainly enough for the *cestui que trust* to show an agreement on the part of the trustee to purchase, and that the money was furnished to him before he acquired the title. In a great majority of cases, this is the only method whereby it can be proven that the consideration is furnished by the *cestui que trust*—hence, when proven, it should be considered *prima facie* sufficient, if not disproven by the trustee. We must presume, then, that the plaintiff's property or money constituted the consideration for one-half of the lot.

M. M. Frederick, who was the person engaged in the transaction, testifies that he acted as the agent of his brother, the plaintiff, in making the purchase of the lot. There is nothing in the record

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opposed to this testimony ; it must, therefore, be accepted as an established fact. No power of attorney was necessary to authorize such act. The plaintiff ratifies it by the bringing of this action, if not before. It can make no difference, therefore, whether the watches given to Wolfe belonged to the plaintiff or his agent. If to the agent, then he must be deemed to have given them for the benefit of his principal, which could properly be done, and such being his intention the watches and the money realized from them legally belonged to the plaintiff. The case is precisely the same as if the agent had advanced his own money for the benefit of his principal, which, if he ratify, the transaction would become a loan dating from the time of the advance.

The instruction asked by defendant, that if the watches belonged to M. M. Frederick the jury should find for defendants, was therefore properly refused ; for although they may have belonged to him at the time of the sale or deposit with Wolfe, the evidence makes out a loan of the proceeds of them to the plaintiff, and so even if the title to the watches were in M. M. Frederick, the plaintiff would still be entitled to recover.

The judgment of the lower Court must be affirmed.

THE STATE OF NEVADA *ex rel.* JOHN C. LEWIS v.
LEWIS DORON.

POWER OF CONTROLLER TO AUDIT CLAIMS. It is the right and duty of the State Controller to audit all claims coming under the provisions of the Act of March 3d, 1869. (Stats. 1869, 158.)

PRESUMPTIONS IN FAVOR OF STATUTES. Every statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution.

ORDINARY SENSE AND IMPORT OF WORDS. The Constitution is to be construed in the ordinary sense and usage of language, literally, unless some apparent absurdity, or obvious and manifest violation of the sense of the instrument, or unmistakable intent of its framers, forbids.

CONSTITUTIONAL DUTIES OF CONTROLLER. The official name of "State Controller," as used in the Constitution, implies recognized duties appurtenant thereto, and means a supervising officer of revenue—among whose duties is the final auditing and settling of all claims against the State.

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DEBATES OF CONSTITUTIONAL CONVENTION. In the examination of constitutional questions, the debates of the constitutional convention may be consulted, as throwing light upon the subject; but they are not authoritative nor of any binding effect—it having been the text only that was adopted.

CONSTITUTIONAL CONSTRUCTION. In construing a Constitution, the thing to be sought is the thought expressed.

EXAMINING POWERS OF EXAMINERS AND CONTROLLER. As the Constitution provides that “no claims against the State (except salaries or compensation of officers, fixed by law) shall be passed upon by the Legislature, without having been considered and acted upon by said Board of Examiners,” (Const., Art. V, Sec. 21) it follows that the constitutional power of the Controller to examine such claims must be exercised, subject to such examination by the Examiners.

EXAMINING POWERS ONLY ADVISORY TO THE LEGISLATURE. The examining powers of the Board of Examiners and of the Controller are, with reference to the Legislature, only advisory.

CONCURRENCE OF EXAMINERS AND CONTROLLER. So far as the examination of claims against the State is concerned, the Board of Examiners assist the Controller, acting concurrently; but they do not deprive him of his constitutional power or any portion of it. Each moves in a designated sphere—all tending to the desired result: the protection of the revenues of the State.

CONSTITUTIONALITY OF ACT RELATING TO CONTROLLER. The Act of 1869, relating to the duties of the Controller, (Stats. 1869, 158) which provides for the auditing of claims by him after they shall have been passed on by the Board of Examiners, etc., neither takes anything away from the constitutional powers of the Board of Examiners, nor adds anything to those of the Controller, and is not unconstitutional.

CLAIM ALLOWED BY EXAMINERS TO BE PRESENTED TO CONTROLLER. Where a member of the Board of State Printing Commissioners had a claim for his services passed upon and allowed by the Board of Examiners, but omitted to have it audited by the Controller; and the latter, for that reason, refused to issue his warrant upon the treasury for the amount so allowed: *Held*, that it was necessary to show a presentation of the claim for allowance to the Controller; and that, without such showing, the Controller would not be compelled by *mandamus* to issue his warrant.

THIS was an original proceeding by petition for the writ of *mandamus* in the Supreme Court. It was commenced on February 17th, 1870. The relator sets forth his selection on March 10th, 1869, by the Controller and Secretary of State, as an expert in printing and a member of the Board of State Printing Commissioners; that he thereupon entered upon the discharge of his duties; that his compensation was fixed at eight dollars per diem; that on January 1st, 1870, he presented his bill of nineteen hundred and sixty dollars for services to the Board of Examiners; that they

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allowed it; that he then transmitted it to the defendant, the Controller of State, for his action; that an appropriation had been made by the Legislature for the payment of such services; that he had demanded of the Controller to draw his warrant on the treasury for the sum so allowed by the Examiners; and that the defendant had refused and still refused to do so.

To this petition the defendant interposed a demurrer, on the ground that the petition did not state facts sufficient to constitute a cause of action, or to entitle petitioner to the relief demanded.

A. C. Ellis, for Relator.

I. The Acts of March 3d, 1869, in relation to the duties of the Board of Examiners and of the Controller, (Stats. 1869, 116 and 158) are unconstitutional and void. They impose upon the Controller the same duties, and grant to him the same powers, which are granted to and vested in the Board of Examiners, by the Constitution (Const., Art. V, Sec. 21; Debates, 161). A power vested in, or duty imposed upon, an officer by the Constitution, excludes by necessary implication any power in the Legislature to vest the same, or concurrent power in, or to impose the same, or concurrent duties upon, any other officer of the State. (*State ex rel. Crawford v. Hastings*, 10 Wis. 525; 15 N. Y. 532; *People v. Draper*, 8 N. Y. 483; *Warner v. People*, 2 Denio, 275.)

Where a power is distinctly granted, by the Constitution, to a particular officer, or department of the government, the Legislature cannot confer such power upon some other officer of the government. Nor can they, indirectly, deprive the officer designated of the full and complete exercise of such power, by vesting a concurrent power in some other constitutional officer, or legislative officer, and throwing by statute such limitations and checks around the exercise of the power granted by the Constitution as to render it ineffectual, thus defeat the plain intent of the fundamental law. This would be doing indirectly that which cannot be done directly.

II. That the constitutional power of the Board of Examiners has been trenched upon—nay, that the Board has been absolutely deprived of its constitutional power, in certain cases, by the Act of

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1869, is too plain for argument. The Act confers upon the Controller all the powers which the Constitution confers upon the Board of Examiners, and provides that any examination they (the Board) may make of claims against the State, which have been authorized by law, and for the payment of which an appropriation has been made, and any action they may take as such Board, shall be of no effect, until the same has been reviewed and approved by some other person, to wit: the Controller.

When the Constitution-makers said that the Board of Examiners should have power to examine all claims against the State, except salaries or compensation of officers fixed by law, they intended, in effect, to make it an Auditing Board; they intended that such Board, by the power conveyed in this clause of the section, should take action upon all claims against the State, (save the exceptions mentioned); that is to say, they should have the power to allow, or reject, the class of claims in this clause referred to. Clearly, they have the power to examine, and—nothing in the Constitution to the contrary—the sole power to examine claims and accounts against the State, except such as, by the independent succeeding clause, have to be acted upon by the Legislature, before final payment. In other words, they have the sole power to examine all claims which the Legislature have authorized to be made against the State, for any given thing, and for the payment of which an appropriation has been made.

It has been suggested that they have the express constitutional power, and the sole constitutional power, to examine all claims, but that the Constitution does not grant them any power to allow or reject any claim: therefore, they cannot allow or reject any claim, which has been provided for by law, unless specially authorized so to do by the Legislature; and all power in this respect being in the Legislature, it may impose such limitations and restrictions upon the Board, and make its action subject to the will or caprice of some other legislative or constitutional officer or person.

We insist upon the more natural and more sensible construction—the one more in consonance with law and sound reason: that when anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive, together

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with the thing, by the grant of the thing itself. (Broom's Legal Maxims, 427.)

III. Again: By this Act the Legislature has provided that unless the Board act within thirty days after the presentation of any claim, the claim shall be transmitted to the Controller, for his final action in the premises; and that after the lapse of thirty days, and such transmission to the Controller, the Board of Examiners shall have no jurisdiction of such account. It is plain that in many cases of claims against the State, from the difficulty of procuring testimony, it would be impossible for such Board to act at all within thirty days; in which event they would be totally deprived of the power to examine such claim, and for this reason also the Act is unconstitutional.

IV. In the event the Court should believe that relator's claim is exempt from the provisions of the Acts in relation to the Board of Examiners, the Controller should still draw his warrant, for the reason that relator is an officer, whose compensation has been fixed in accordance with law; and nothing is left to be ascertained but the time of service. The law fixes this; and the Controller has no more power over it, than he has over the compensation or salary of any constitutional officer.

V. Under our Constitution the Board of Examiners are *ex officio* Auditors; and it is their exclusive right and duty to ascertain and fix the amount of all claims against the State, except salaries or compensation of officers fixed by law. The duties of Controller, from the character of his office, are totally different from those of an Auditor. (Burrill's Law Dic., titles Auditor and Controller; Webster's Dic., words "Auditor and Controller"; 16 Cal. 53.)

R. S. Mesick and J. Seely, for Defendant.

I. The petition ought to show that the claim of the relator was based upon such facts as to make it appear to be just and valid against the State. As ground for this writ, he has undertaken by his petition to show not only an act of the Board of Examiners in his favor, but also the basis of his claim presented to the Board.

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But the petition does not show, in terms, that the Board ever did examine the claim, or that the relator ever performed a single day's service as expert in printing, for which he claims a per diem compensation. Assuming that its allowance by the Board might, in some cases, raise such a presumption of merit in a claim as to justify the Courts in ordering its payment by the State officers, upon the bare showing of the fact of such allowance, still, whenever the claimant in his petition does not rely upon that fact alone, but enters into a showing of the ground of his claim, he must show enough to make the claim appear just and legal for the amount claimed. Or in other words, in such a case the Court should presume that the omission to state facts necessary to make the claim appear meritorious is on account of the non-existence of those facts. The omission in this case to show the number of days, or any period, of service by the relator as printing expert, we contend, justifies the Court in withholding the peremptory writ demanded, on the face of the petition itself.

II. "Power to examine all claims against the State," etc., given to the Board of Examiners, is not to be considered as prohibitory of any investigation on the part of anybody else intrusted by the Constitution or the Legislature with control over or care of the moneys of the State. The language of the section of the Constitution referred to shows that the legislative action upon such claims may be had, and is contemplated by the Constitution. And such legislative action must be considered either as in review of the action of the Board, or as the supplement of the action of the Board necessary to a conclusive decision.

The language of that section of the Constitution shows that the functions of the Board of Examiners, in reference to claims against the State, are to take evidence in support of and against such claims, examine and report them, with the testimony and its conclusions, to the Legislature of the State, or to some committee or person directed by the Legislature to aid in maturing the matter of the claim for final rejection or payment.

And as the Legislature might constitutionally require as a condition of payment, that all claims should be passed upon by the

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Legislature after "having been considered and acted upon by the 'Board of Examiners,'" why might it not, in lieu of its own action, direct, as is done in the statute referred to, that some financial officer of the State, as the Controller, whose duties the Legislature must prescribe, shall scrutinize or look into such claims as a condition of their payment, without being "passed upon by the Legislature?"

III. The drawing of warrants is not an act directed by the Constitution to be done. It is a pure legislative direction. Some other mode than by a Controller's warrant might have been provided by the Legislature for drawing money out of the State treasury. But as it is, the drawing of Controller's warrants is so far under the control of the Legislature, that that body is fully competent to prescribe any reasonable conditions looking toward the safety of the State funds, upon which the Controller may issue his warrants. If the Legislature can require all claims to be passed upon by itself before payment, it certainly can provide that the Controller shall not draw his warrant simply upon the action of the Board of Examiners. And if the Legislature has waived its action upon the claim of the relator, and authorized a Controller's warrant to be drawn for the amount of his claim notwithstanding its non-action, but upon the condition that the Controller shall first pass upon the right of the relator to have such warrant, he cannot say that his claim shall not be passed upon by either the Legislature or Controller. If he will not tolerate the action of the Controller upon his claim, the Legislature has said, in effect, that he shall have no Controller's warrant, and he is remitted to the action of the next Legislature.

By the Court, WHITMAN, J.:

The relator, by his affidavit, shows that he is a member of the Board of State Printing Commissioners of the State of Nevada, filling the position of Expert and Secretary. That he has been allowed for his services in such capacity, by the State Board of Examiners, the sum of nineteen hundred and sixty dollars. That such allowance has been reported by the Board to defendant, the

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State Controller; who, although requested, refuses to issue his warrant upon the treasury for the amount allowed.

A mandamus to compel such issuance is prayed. Upon the affidavit an alternative writ was ordered; and defendant appearing, demurs to the sufficiency of the affidavit, upon the general ground that it does not state facts sufficient to constitute a cause of action. Several specifications are made; but the only one important to be considered, is that based upon the neglect of relator to aver that his claim had either been audited by the Controller, or that request had been made for such action.

The point made upon argument, that relator's claim is in the nature of a salary, and therefore exempt from action either of Board of Examiners, or Controller, will not be considered in this opinion, for the reason that the affidavit charges no breach of duty by defendant, based upon any such hypothesis.

The position taken by defendant is, that, as Controller, it is his right and duty to audit all claims coming under the provisions of the statute entitled "An Act to amend an Act entitled 'An Act defining the Duties of the State Controller,' approved February 24th, 1866," passed March 3d, 1869. This Act is as follows:

"Section 1. Section five of the above entitled Act is hereby amended, so as to read as follows: Section five. He shall audit all claims against the State for the payment of which an appropriation has been made, but of which the amount has not been definitely fixed by law, and which shall have been examined and passed upon by the Board of Examiners, or which shall have been presented to said Board, and not examined and passed upon by them with[in] thirty days from their presentation; and he shall allow of said last mentioned claims, (not passed upon by the Board of Examiners within said thirty days after *after* presentation) the whole, or such portion thereof as he shall deem just and legal; and of claims examined and passed upon by the Board of Examiners, such an amount as he shall decree just and legal, not exceeding the amount allowed by said Board. And no claim for services rendered or advances made to the State, or any officer thereof, shall be audited or allowed, unless such services or advancement shall have been specially authorized by law, and an appropriation made for its pay-

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ment. For the purpose of satisfying himself of the justness and legality of any claim, he shall be allowed to examine witnesses under oath, and to receive and consider documentary evidence in addition to that furnished him by the Board of Examiners. He shall draw warrants on the Treasurer for such amounts as he shall allow of claims of the character above described, and also for all claims of which the amount has been definitely fixed by law, and for the payment of which an appropriation shall have been made." (Stats, 1869, 158.)

Opposing this position, the relator contends that the Act cited is unconstitutional, for that it attempts to take away from the Board of Examiners the power expressly conferred upon them by the Constitution, of auditing all claims against the State. It is confessed that no attempt has been made to have this claim audited by the Controller, and for the reason that, having been allowed by the Board of Examiners, it is in all respects a liquidated demand, entitled to payment without further examination, and upon which a warrant should presently issue.

In reply, defendant says that the power claimed for the Board of Examiners is greater than exists by virtue of the Constitution; and that, by that instrument, he is made the ultimate and final auditor of all claims requiring such action.

The sections of the Constitution relied upon by the parties are as follows:

"Sec. 19. A Secretary of State, a Treasurer, a Controller, a Surveyor General, and an Attorney General, shall be elected at the same time and places, and in the same manner, as the Governor. The term of office of each shall be the same as is prescribed for the Governor. Any elector shall be eligible to either of said offices.

"Sec. 21. The Governor, Secretary of State, and Attorney-General * * * shall also constitute a Board of Examiners, with power to examine all claims against the State, (except salaries or compensation of officers fixed by law) and perform such other duties as may be prescribed by law. And no claim against the State (except salaries or compensation of officers fixed by law) shall be passed upon by the Legislature, without having been con-

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sidered and acted upon by said 'Board of Examiners.'” (Const. Art. V.)

Premising that every statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution; that the Legislature has power to pass any law, not positively prohibited, or by clear implication forbidden by the Constitution; and that such instrument is to be construed in the ordinary sense and usage of language—literally, unless some apparent absurdity, or obvious and manifest violation of the sense of the instrument, or unmistakable intent of its framers forbids; and that it is not allowable to interpret what has no need of interpretation: it would seem that the question presented was of no difficult solution.

Looking at the section first referred to, it will be seen that an officer called a “Controller” was provided for. His duties are not otherwise specified, than by the name of his office; and nothing, save this, is anywhere said concerning them in the Constitution—except as follows:

“Sec. 21. The Secretary of State, State Treasurer, State Controller, Surveyor-General, Attorney-General, and Superintendent of Public Instruction, shall perform such other duties as may be prescribed by law.” (Const., Art. V.)

Nor are any duties, save in the manner suggested, prescribed in the Constitution for the Treasurer or Surveyor-General. Why, then, say that they and the Controller shall perform such other duties as may be prescribed by law, if no duties have been mentioned? Evidently, because the official name implies recognized duties appurtenant thereto. This, probably, will be undisputed as to the first two named officers. A little examination will show that it is equally clear as to the Controller.

Upon review of the Constitution and statutes of the different States of this Union, it will be found, that in a large majority some supervising officer of revenue is provided for—among whose duties is the final auditing and settling of all claims against the State; and in all cases where such distinctive officer exists, he is called, indifferently, “Controller of Public Accounts,” “Auditor,” “Controller-General,” “Auditor-General,” “Auditor of State,” “Auditor of Public Accounts,” or “Controller.” For instance: in Alabama,

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Connecticut, and Texas, he is styled "Controller of Public Accounts"; in Arkansas, Indiana, Kansas, Minnesota, and Ohio, he is styled "Auditor"; in Georgia, "Controller-General"; in Michigan, "Auditor-General"; in Iowa, Missouri, and Rhode Island, "Auditor of State," or "State Auditor"; in Illinois, Kentucky, Mississippi, Oregon, and Virginia, "Auditor of Public Accounts"; in California, New York, and Nevada, "Controller." This, then, being the received use in the States of this Union of these official names, it follows that the Constitutional Convention of Nevada thus used the term "Controller," unless the instrument itself negatives such presumption. Of that hereafter.

So far as the sections touching the Controller are concerned, they sustain this position: first, in naming the officer; second, in suggesting other duties, when none had before been named, unless they followed and attached to the titular designation of such officer.

It is not improper in this connection to examine the debates upon the subject, though of course they are not authoritative, nor is any binding effect to be given them—as it is the text of the Constitution which the people adopted. It appears that it was proposed in Convention to strike out the words "State Controller," and substitute "Auditor of State," in order that there might be no necessity of altering the territorial statutes defining the duties of the office, and for no other reason. Upon suggestion, however, that such difficulty could be obviated in the schedule, the motion was lost—every member who spoke upon the question, however, agreeing that the names were synonymous. (Debates, 613–14.) Following the suggestion made, it was provided in the schedule that * * "The Territorial Auditor shall continue to discharge the duties of his said office until the time appointed for the qualification of the State Controller." (Const., Art. XVII, Sec. 14.)

The relator, however, contends that the word "Examiners" means "Auditors; and that the powers incident to the name, being specially conferred, are taken from the Controller. Admit the proposition as to the meaning of the word, yet the conclusion does not follow: for the Board of Examiners might be Auditors, and still the Controller be, as his name implies, Chief Auditor. There are Auditors known in the Federal Government and elsewhere,

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of various grades. But why seek to interpolate a word into the Constitution, or give to a word already there a meaning not absolutely clear, when by a literal reading the various sections are harmonious? In construing a Constitution the thing to be sought is the thought expressed.

The Constitution of the State of Nevada says, that * * “No claim against the State (except salaries or compensation of officers fixed by law) shall be passed upon by the Legislature, without having been considered and acted upon by said ‘Board of Examiners.’” Why? As a restriction of legislative power. It having all law-making power not taken away, could perhaps have entirely ignored the Board of Examiners, in absence of some prohibitory language—such was the view under which the clause quoted was offered. (Debates, 161.)

Such prohibition was unnecessary as to the Controller, as he possesses only such powers as the Constitution confers upon him—therefore, when that instrument empowers the Board of Examiners to examine all claims, he must exercise his power subject to such examination. What is this examination? Confessedly, by the words used, and as admitted by counsel on the argument of this case, with reference to the Legislature, only advisory.

Why greater or higher toward the Controller? Because, says counsel, otherwise there arises one of two absurdities: Either there is a Board with power only to examine—which is a nugatory, idle matter—or else, there is a Controller with power to allow, but no power to examine.

As to the first proposition be it said, that with reference to the Legislature only such idle and nugatory power, if such it be, exists; and it can involve no more absurdity in one case than in the other. But such power is neither idle nor nugatory. It may and probably does materially assist both the Legislature and Controller. It serves to give a fuller airing and ventilation of claims, than might or probably would follow from one examination—and to that extent, throws additional restraints and safeguards around the treasury.

The second objection has no existence, provided the definition of the word “Controller,” before given, be correct. The Board is advisory; he is chief. They assist in his onerous duties—acting

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concurrently, so far as examination is concerned: but they do not deprive him of his constitutional power, or any portion of it. Each moves in a designated sphere—all tending to the desired result: the protection of the revenues of the State.

It cannot with propriety be claimed that an absurd meaning should be given any constitutional clause, when such result can properly be escaped—and here no absurdity arises, if words be read in their ordinary and usual sense.

It is argued that this view deprives the Board of Examiners of all power, and places them in a subordinate position. By no means. The power granted is great and useful; and though its magnitude would be increased by the opposite view, its usefulness would be diminished—as in that case, the Board would be the sole tribunal, before which claims against the State would be examined: while, on the other hand, the investigation is double, consequently more searching and protective.

It must be remembered that this Board is composed of State officers, having other high and responsible duties imposed and powers given by the Constitution—this matter of examining claims being only in addition thereto; so if there be any force in the argument that they are rendered subordinate, still such subordination is in only one particular, outside of the special powers pertaining to their general official position, and the point taken would therefore seem to have more force as applied to the Controller, who, although equally a constitutional officer, and naturally, it would be supposed, created for some important purpose in the State administration, would be the veriest clerk, if it be held that the Examiners are the sole auditors. Possibly such was the intention; but it would be taking a bold and rash step to thus emasculate the official function of a constitutional officer without the clearest expression. To do so by implication would be without warrant.

Such arguments, however ingenious, can lend no aid to the proper reading of a Constitution, save so far as they may tend to point the thought sought to be expressed by its framers. Is this or any extraneous aid necessary in this case? The Court of Appeals of New York has well stated the rule within which this case comes, saying:

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“Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument; and neither Courts nor Legislatures have the right to add or to take away from that meaning. This is true of every instrument; but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of States, the rule rises to a very high degree of significance. It must be very plain—nay, absolutely certain—that the people did not intend what the language they have employed, in its natural signification, imports, before a Court will feel itself at liberty to depart from the plain reading of a constitutional provision.” (*Newell v. The People*, 3 Seld. 97.)

It is further urged that the word “examine,” if not directly expressing, yet necessarily implies the power of allowance or rejection which is consequently taken from the Controller. If such be the implication, still, pursuing the same train of reasoning, and following the same authority as before, it is a primary action subject to the ultimate and final decision of the Controller. Whether the word carries with it the additional meaning as claimed or not, still, as the Legislature has the power to establish any condition precedent to the obtaining a warrant on the treasury, so that the Constitutional power of the Controller is not trenched upon, nor any constitutional right of a claimant infringed, it is perfectly legitimate to provide that the Board of Examiners shall, upon investigation of claims, allow or reject the same—subject, of course, to the final revision of the Controller. Such seems to be the object of the statute under review. It takes nothing away from the constitutional

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power of the Examiners, and adds nothing to those of the Controller; nor does it deprive a claimant of any right.

Such was not the case in the Wisconsin Statute, commented on in *The State ex rel. Crawford v. Hastings*, (10 Wis. 525) cited by counsel for relator. The statute there considered attempted, at least so the Court thought, to virtually supersede a constitutional officer and deprive him of his legitimate authority. The reasoning of the opinion, however, applies with force to the case at bar, in the view here taken.

By the Constitution of Wisconsin, the Secretary of State was made "*ex officio* Auditor"; no duties were prescribed, but the Court held that this official designation carried with it a positive delegation of powers, among which was the auditing of all accounts and demands against the State. Now it has been seen that, as used in the Constitutions and statutes of the States of this Union, the words "Auditor" and "Controller" are synonymous; therefore, upon the reasoning of the Court referred to, the official designation of Controller, in the Constitution of the State of Nevada, of its own force, was a positive delegation of the powers usually incident to the office of Controller, Auditor, Controller-General, Auditor-General, or any of the various names used to designate a like officer. It would be violating the plainest rules of constitutional construction to attempt to take away this recognized power, because, in addition to this superior officer, the framers of the Constitution had provided a Board who should "examine" all claims against the State.

As has been said, such provision was undoubtedly wise and just, and in strict harmony with the evident attempt pervading the entire instrument—to guard the people's money. Using the word "Controller," a specific and defined meaning was expressed, comprising many powers, among which is the examination and allowance of claims against the State.

In section twenty-one, article four, of the Constitution, as touching the Board of Examiners a specific power is conferred, subject to the higher authority, which could be legitimately amplified by legislative action, in any direction not opposed to its nature, nor

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subversive of the positive power delegated the Controller by virtue of his official designation.

Turning to that portion of the statute attacked, which is applicable to this case, it will be seen that the Legislature provides that the Controller "shall audit all claims against the State for the payment of which an appropriation has been made, but of which the amount has not been definitely fixed by law, and which shall have been examined and passed upon by the Board of Examiners"

* * * * *. This enactment is not in violation of the Constitution, but, as has been seen, strictly in conformity therewith.

As the relator has failed to state a compliance with the portion of the law last quoted, he has consequently failed to state a sufficient cause of action, and therefore the demurrer is well taken. It was understood, upon the argument, that the relator could not amend in this regard; but to save all question, he will be allowed time.

The order of the Court is that the demurrer be sustained, with leave to relator to amend within ten days.

Let it be so entered.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEVADA,

APRIL TERM, 1868.

THE STATE OF NEVADA, APPELLANT, v. THE YELLOW JACKET SILVER MINING COMPANY, RESPONDENT.

APPEAL ON GROUND OF VERDICT AGAINST EVIDENCE—CONFLICT OF TESTIMONY.

An Appellate Court will not disturb the verdict of a jury upon the ground that it is not supported by the evidence, if there is a material conflict in the evidence and there is some substantial testimony to support it.

WHEN A VERDICT WILL BE REVERSED AS AGAINST EVIDENCE. To justify an Appellate Court in reversing the verdict of a jury on the ground that it is against evidence, there must be a preponderance of evidence against it so great as to satisfy the Court that there was either an absolute mistake on the part of the jury, or that they acted under the influence of prejudice, passion, or corruption.

DISTINCTION AS TO WEIGHT OF EVIDENCE ON NEW TRIAL AND ON APPEAL. The rule that a verdict should not be reversed as against evidence by an Appellate Court, where there is a material conflict in the testimony, and there is some substantial evidence to support it, does not apply with strictness to motions for new trial; and it is generally held that on such motions, to authorize the *nisi prius* Judge to set aside a verdict, the weight of evidence against the verdict need not be so decided and great as is required by an Appellate Court to reverse it.

TRIAL BY COURT—FINDINGS EQUIVALENT TO VERDICT. Where a cause is tried by a Court without a jury the same weight and consideration is given to its find-

5	415
4	387
4	400
4	500
8	600
18	1200
14	2000
14	4000
19	2300
8	4900
5	415
23	165

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ings as to a verdict ; and the same rules apply as to reversing them on appeal on the ground of being contrary to evidence, as to a verdict of a jury.

TIME OF PUBLICATION—"ONCE A WEEK FOR THREE WEEKS." Where a statute for the maintenance of public schools (Stats. 1864-5, 413, Sec. 35) provided that to impose an additional school tax, an election should be called by posting notices for twenty days, and "if there is a newspaper in the county, by advertisement therein once a week for three weeks": *Held*, that it was not necessary for the call to be published twenty-one days before the day of election, but that three insertions upon three successive weeks and at any time in any of such weeks before the election, were sufficient.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This cause was decided at the April Term, 1868, but not ready for publication in 4th Nevada Reports. As will be seen there was a difference of opinion in the bench, the views of Lewis, J. in respect to one branch of the case being concurred in by the then Chief Justice Beatty, and in respect to the other branch of the case, by Johnson, J.

The whole amount of the tax for which suit was brought, was five hundred and eighty-five dollars and nine cents. There was judgment for defendant, from which and from an order denying plaintiff's motion for a new trial, this appeal was taken.

Samuel C. Denson, for Appellant.

I. The assessment-roll was introduced as evidence of the delinquency, the property assessed, amount of delinquency, and that all the forms of law in relation to the levy and assessment of the tax had been complied with ; and such evidence established *prima facie* every fact to entitle the plaintiff to recover. (Stats. 1864-5, 287, Secs. 34 and 36.) The plaintiff was therefore entitled to a recovery, unless the defendant's evidence was so direct and strong as to overthrow or outweigh plaintiff's *prima facie* case. An Appellate Court should reverse a judgment against the weight of evidence unless the equities of the case are with the verdict. (Graham & Waterman on New Trials, 362 and 367.)

II. The testimony of Jones shows the existence of better evi-

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dence of the time of posting the notices. He says Bence posted them. If the defendant believed the notices were not posted in time, Bence should have been called as a witness. Where it appears that all the evidence was not before the Court on the trial, the Appellate Court will order a new trial in order that complete justice may be done. (1 Graham & Waterman on New Trials, 374.)

III. Publication in a newspaper every day from the nineteenth of July until the fifth of August, is more than ample as a publication "once a week for three successive weeks." (*Bachelor v. Bachelor*, 1 Mass. 253; *Sheldon v. Wright*, 5 N. Y., 1 Seld, 517; *Olcott v. Robinson*, 21 N. Y. 150; 9 Curt. 94).

Robert M. Clarke, for Respondent.

I. There being some evidence to support the findings, and the motion for a new trial having been denied, this Court will not reverse the order. (16 Cal. 76; 17 Cal. 92; 24 Cal. 338; 25 Cal. 437; 32 Cal. 332 and 530.)

II. But the findings are not impeached by any testimony in the record. Jones testifies that the notices were prepared July 15th, 1867, and posted by Bence some time after they were prepared—not on same day; and that copy was handed to editor *Appeal* on evening of said day, or day after notice was posted by Bence. Robinson testifies that notice was published first time July 19th, and thinks it was handed in for publication on the eighteenth. From this proof it clearly appears that the notices were neither posted twenty days, nor published three weeks. Under this proof, the notice could not have been posted earlier than July 17th, 1867, and as the election was held August 5th, 1867, only nineteen days' notice was given by posting, and seventeen by publication, including the day of election.

III. The Board of Trustees in calling election for special school tax, are required to give twenty days notice, by posting notices, and by publication for three weeks in county paper. Having failed

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to comply with this section of the law, the election was irregular, and the tax imposed illegal and void. (1 Denio, 9; *Bunce v. Reed*, 16 Barbour, 347; *Olcott v. Robinson*, 21 N. Y. 155; Opinions of Comstock, C. J.; *Sheldon v. Wright*, 7 Barbour, 39.)

. By the Court, LEWIS, C. J.:

The appellant seeks a reversal of the judgment in this case, upon the sole ground that the findings of fact by the Court below were not warranted or supported by the evidence. But as the evidence is conflicting, it is claimed on behalf of the respondent that this Court should not set aside the findings, or reverse the judgment—and thus the question as to what state of proof will authorize an Appellate Court to set aside a verdict, when no objection is made to it except that it is not supported by the evidence, is directly presented. It must be admitted that there is an endless difference of opinion, among the members of the profession, upon this question; but it appears to me the rule is well established by the authorities, and maintained upon principle, that an Appellate Court will not disturb the verdict upon the ground here taken, if there is a material conflict in the evidence, and there is some substantial testimony to support it.

This rule is certainly recommended by obvious and cogent reasons. Under our laws it is the peculiar province of the jury to weigh the evidence, to judge of the credibility of witnesses, and to decide upon which side the testimony preponderates. It is their duty, and they are sworn, to render such verdict as the evidence may justify. It must be presumed that they conscientiously do their duty, and that they are competent to do it understandingly. The verdict, therefore, when rendered, is the conscientious conclusion arrived at by twelve competent men, who have heard the evidence and seen the witnesses. It must also be borne in mind, that they have the opportunity of closely observing the manner in which each witness testifies; his appearance on the stand; his emphasis and the inflection of voice, which often give a significance and meaning to words and sentences not apparent to those who only read the evidence as it is usually taken down. The Appellate Court sees nothing of the witnesses, but is compelled to rely solely

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upon the imperfect and meager synopsis of the testimony which is taken at the trial, or written down afterwards from recollection. Thus, it does not possess the means which the jury do, of determining what weight is to be given to the evidence of any particular witness, or of ascertaining with certainty what it may have been his real desire to say.

The advantages thus possessed by the jurors should entitle their deliberate conclusion, as to the preponderance of evidence, to very great consideration from an Appellate Court possessing none of these advantages. The rule seems, therefore, to be founded upon substantial reasons; and in my opinion is supported by the authorities. It will also be observed, from the cases which I shall refer to, that the old rule has not been changed by the new practice of allowing an appeal from an order granting or refusing a new trial. After an elaborate review of the authorities, Mr. Waterman, in 8 *Graham & Waterman on New Trials*, 1213, states his views of this question in the following manner:

“It has been a debated and vexed question as to whether, after the Court that tried the cause has decided that the verdict must stand, an Appellate Court can, notwithstanding, order a new trial. The presiding Judge has heard—and what is still more important—has seen the witnesses testify; noticed their demeanor; listened to their cross examination. Minute circumstances, which are often the turning point in a case, have not escaped him. The evidence has been presented full and fresh to his mind—after having passed through the slow and severe ordeal of judicial scrutiny. He has had the benefit of the siftings of counsel. On the other hand, the Appellate Court has enjoyed none of these advantages. It receives the testimony on paper; and thus presented, it is always tame, meager, and unsatisfactory. Its whole knowledge being thus derived, it is but illy qualified to pass an enlightened judgment upon it. The reasons, therefore, for denying to the Appellate Court the right to reverse the decision of the Judge who tried the cause, confirming the verdict, possesses great weight. It is certain, that this right should never be exercised except in extreme cases.”

The force of the reasons thus stated by the author is fully recognized by the Courts, and the uniform current of authorities seems

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to justify the observation that the "right should never be exercised except in extreme cases." In *Cohen v. Dupont*, (1 Sandford, 262) the Court states the rule in this manner: "Where there is testimony on either side sufficient to warrant a verdict if standing alone, we are not at liberty to overturn the verdict for the reason that there was counter testimony on the other side, even if it be apparently equal in point of weight. *There must be a preponderance of evidence against the finding of the jury so great as to satisfy us that there was either an absolute mistake on their part, or that they acted under the influence of prejudice, passion, or corruption.* (See also *Mann v. Witbeck*, 17 Barb. 388; 5 Sandford, 180; 1 Whittaker's Practice, 745.) In Kentucky the rule is thus stated by the Court of Appeals in the case of *Maxwell v. McIlvoy* (2 Bibb, 211): "What verdict we would have given if we had been on the jury is not the question for our discussion. The circumstances and evidence in relation to the facts of loss and injury to the plaintiff, and of the negligence of the defendant, belonged peculiarly to the jury to weigh and determine upon. If their verdict were clearly contrary to the evidence it was the duty of the Court before whom the cause was tried to have granted a new trial, and if that Court improperly refuses to do so, and the error was manifest to us, we should feel it our duty to reverse the judgment and direct a new trial. But this power ought to be exercised by the Court with extreme caution, when we consider the great difficulty, and indeed the impossibility, of bringing the question before us upon paper as it may have appeared before the Court and jury who tried it below. It is true this case does not present the same latitude for misconception and adverse understanding of the evidence as those in which the credibility of witnesses, their pronunciation, etc., are all important to the decision. This consideration furnishes additional weight in favor of the application to this Court, yet we hold that in order to justify this Court in reversing and ordering a new trial upon the ground that the verdict is contrary to the evidence, the evidence and verdict ought to appear clear, in an unquestionable light, and without doubt, when carefully examined and compared together, as repugnant and opposed, the one *obviously* not supporting or warranting the order."

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The rule thus enunciated has been uniformly followed by the Court of Appeals in Kentucky, and repeated with more or less force in nearly all the cases in which the question has been presented. (See also *A. K. Marshall*, 58 and 29.)

In Tennessee the Court of Errors has held that it will not reverse the verdict of an inferior Court if there be any proof by which the verdict can be sustained. (*Dodge v. Brittain*, 1 Meigs, 84; *Sellers v. Davis*, 4 Yerger, 503.) So in Georgia, the Supreme Court, in the case of *Hall v. Page*, (4 Geo. 428) reiterates the rule in this emphatic language: "We have, in several instances, said that we would interfere only in extreme cases—in cases that are strong and unequivocal, or of gross injustice, or where there was no evidence, or the verdict was palpably contrary to the evidence."

In those States where an appeal is allowed from an order refusing a new trial, the same rule is strictly followed and just as strongly stated. (*Lockwood v. Stewart*, 12 Wis. 628; *Laville v. Lucas*, 13 Wis. 617; *Lewellen v. Williams et als.*, 14 Wis. 687; *Cook v. Helms*, 5 Wis. 107; *Barnes v. Merrick*, 6 Wis. 57; 11 Minn. 296; *Whitney v. Blunt*, 15 Iowa, 283; *Brockmam v. Berryhill*, 16 Iowa, 183; *Kile v. Tubbs*, 32 Cal. 332 and 530; *Lubeck v. Bullock*, 24 Cal. 338.)

The evidence on behalf of the defendant, although weak and very unsatisfactory, still seems to be sufficient to bring this cause within the rule. The evidence offered by the defendant does not seem to warrant the findings, but I cannot say that there is such a great preponderance on the other side as to justify an Appellate Court in setting them aside. The plaintiffs' case was made out by a presumption of law, not by any means very strong, and the testimony for the defendant was about as unsatisfactory as it could be. However, under the rule which must govern this case, it is sufficient to sustain the findings. Some of the reasons given for supporting the verdict of a jury may not be pertinent, when the trial was without a jury and the facts are found by the Judge. The rule, however, is general, and the same weight and consideration is always given to such findings as to a verdict. It must be borne in mind that this rule should not govern the lower Courts. The Judge who tries

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the cause, like the jury, hears all the evidence and sees the witnesses ; it is, therefore, very generally held that the weight of evidence against the verdict need not be so decided and great to authorize the *nisi prius* Judge to set aside a verdict as is required by the Appellate Courts. The Judge who tried the cause should not hesitate to set aside a verdict where there is a clear preponderance of evidence against it.

The conclusion at which I have arrived upon this point disposes of this case ; but there is another point made against the validity of the tax which will probably be raised in other cases growing out of this assessment and levy. Hence, it is expedient to pass upon it at the present time, and thus remove the question from consideration in other cases not disposed of, or which may hereafter be brought. This second point made by counsel for defendant is, that the notice which the law requires to be published "once a week for three weeks" was advertised only for seventeen days, which, it is argued, was not a compliance with the requirements of the law. The language of the statute, it is claimed, makes it necessary that the first publication should be twenty-one days prior to the election. But, in my opinion, the statute admits of no such construction. The purpose of the advertisement is to give notice to the legal voters of the school district. When there have been three insertions of such notice upon three successive weeks the object of the publication, so far as it can be, is accomplished. The statute certainly requires but three publications of the notice ; why then is not its full purpose accomplished upon the expiration of the third day of publication. Some statutes require a publication for a definite period of time, or a certain number of days, and in such case of course the advertisement must be for the full period, but where it is required to be published once a week for a certain number of weeks, it is generally held that the number of insertions and not the days comprised in such weeks is to be regarded. Thus, in the case of *Bachelor v. Bachelor*, (1 Mass. 256) it was held that "an order to give notice by publishing in a newspaper three weeks successively" was complied with by publishing in such paper in three successive weeks. In that case, the paper being issued twice a week, only twelve days elapsed between the first and last adver-

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tisement; but as there was one advertisement on three successive weeks, the Court held it sufficient. So it has been held by the New York Court of Appeals upon a statute similar to ours. (*Sheldon v. Wright*, 5 N. Y. 497; *Olcott v. Robinson*, 21 N. Y. 150.) The publication was therefore sufficient.

Judgment affirmed.

By JOHNSON, J. :

Section thirty-five of "An Act to provide for the Maintenance and Supervision of Public Schools," approved March 20th, 1865, provides as follows: "The Board of Trustees of any school district may, when in their judgment it is advisable, call an election, and submit to the qualified electors of the district the question whether a tax shall be raised to furnish additional school facilities for said district, or to keep any school or schools in such district open for a longer period than the ordinary funds will allow, or for building an additional school house or houses, or for any two or all of these purposes. Such election shall be called by posting notices in three of the most public places in the district for twenty days, and also if there is a newspaper in the county, by advertisement therein once a week, for three weeks. Said notices shall contain the time and place of holding the election, the amount of money proposed to be raised, and the purpose or purposes for which it is intended to be used. The Board of Trustees shall appoint three Judges to conduct the election, and it shall be held in all other respects as nearly as practicable in conformity with the general election law. At such election the ballots shall contain the words: "Tax, Yes," or "Tax, No," and also the name of one person as Assessor, and one as Collector: *provided, however*, the same person may be elected to both offices. If a majority of the votes cast are "Tax, Yes," the officers of the election shall certify the fact to the Board of Trustees, and shall also certify the names of the person or persons having the plurality of votes for Assessor or Collector. The Board of Trustees shall issue certificates of election, and the Assessor shall, on receiving his, forthwith ascertain and enroll, in the manner provided for County Assessors, all the taxable persons and property in the dis-

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trict, and within thirty days he shall return his roll footed up to the Board of Trustees. The Board of Trustees, upon receiving the roll, shall deduct fifteen per cent. therefrom for anticipated delinquencies, and then, by dividing the sum voted, together with the estimated cost of assessing and collecting added thereto, by the remainder of the roll, ascertain the rate per cent. required; and the rate so ascertained shall be, and it is hereby levied and assessed to, on or against the persons or property named or described in said roll, and it shall be a lien on all such property until the tax is paid; and said tax, if not paid within the time limited in the next succeeding section for its payment, shall be recovered by suit, in the same manner and with the same costs as delinquent State and county taxes."

Under this authority an election was called in District No. 2, Ormsby County, for Monday, the fifth of August, 1867, to vote on the question of levying a tax for the purpose of building a school house in said district, and upon the proceedings had it is claimed that defendant became liable to pay the amount of tax assessed upon its property; and to enforce its payment suit was brought in the District Court. The answer of defendant presents but one ground of defense which is necessary to be considered here—whether the time of posting and advertising such notices was sufficient under the section of the law above quoted. The cause was tried by the Court without a jury, and the findings and judgment were for defendant; and a new trial being denied, this appeal is taken from both the order and judgment.

There is no controversy as to the facts concerning the newspaper advertisement, but it is conceded that the notice calling such election for Monday, the fifth of August, 1867, was published in a newspaper of said county for the first time on Friday, the nineteenth of July, and continued almost daily in each issue of the paper up to and including Sunday, the fourth of August, the day preceding the election. That it was not published on the day of such election, the fifth of August, as no paper was issued on that day. Upon these facts, the Court held that the newspaper publication was insufficient in point of time. This brings up the main question in the case, for it is conceded that if the notice was not

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published for the requisite length of time, the election held in pursuance thereof was void, and the assessment made is also void and cannot be enforced.

The statute authorizes an election for the purposes stated, upon certain conditions, by posting notices in three public places of the district for twenty days, and also if there is a newspaper in the county, by advertising therein once a week for three weeks. This is the language of the statute, and adopting the line of argument and mainly the language of Chief Justice Comstock, in *Olcott v. Robinson*, (21 N. Y., 156) its plain meaning is that three whole weeks must elapse between the commencement of the advertisement and the day of the election. If we abridge the time for a single day, we may do it for as many days as we please, and the statute becomes a dead letter. This advertisement must be made by posting the notice of the election in the manner pointed out by the statute, and by causing a copy to be printed "once a week for three weeks" in a newspaper of the county, if there be one published therein. Two things, therefore, are required to make the advertisement complete: one, the posting the notice; the other, its insertion in a newspaper; and the publication in both its branches must be for the respective periods before such election. There is no publication at all unless the notice is both posted and printed in a newspaper; and if we say that the time of either may be shortened, we hold in substance that an advertisement for any time less than the prescribed time is sufficient. This we cannot do without abrogating the statute. These views, although expressed by a minority of the Court, present the question correctly and forcibly, and as I will show are abundantly supported by the decisions of other Courts of high authority. Some of the cases bearing on this point I will notice.

In 1 Wend. (anon.) 90, the affidavit set out that the notice had been regularly published in the newspaper directed, once in each week for six weeks successively, commencing on a certain day. It was held insufficient in not showing that it had been published for the full term of six weeks successively—that is, for forty-two days. A similar rule prevailed in *Bunce v. Reed*, (16 Barb. 347). See also, *Ronkendorff v. Taylor's Lessee*, (4 Pet. 349). The Supreme

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Court of the United States (*Early v. Doe*, 16 Howard, S. C. R. 610) held that notice of a tax sale once in each week for twelve successive weeks is not given, unless the first notice preceded the sale eighty-four days. This case seems to be more directly in point than any I can find. "The preposition *for*," says the Court, "means of itself duration when it is put in connection with time, and as all of us use it in that way in our every-day conversation, it cannot be presumed that the Legislature, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it shall not be done before. The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words "once a week," which precede in this statute those which follow them, "for at least twelve successive weeks."

The Supreme Court of California, in a recent case construe like words of a statute in the same way, and in commenting on a number of reported cases where the question was made, the Judges take care to confine their decisions to the point that the full term required by statute must intervene between the first publication of notice and the day appointed for the performance of the act designated in the notice. (*Savings and Loan Society v. Thompson*, 32 Cal, 347.)

Appellant's counsel refers us to some authorities which are claimed to be the other way. In the first of these, *Bachelor v. Bachelor*, (1 Mass. 256) the order was directed to be published "three weeks successively," and all that the Court decided was, that a week need not intervene between each publication. The time fixed for showing cause does not appear from the report, and hence it is not shown whether the first publication was three weeks more or less before the time for showing cause. But aside from this, the order was expressed in different terms from those employed in the act we are considering, and we have no reason to suppose

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that the Massachusetts Court would have differed with the Federal Supreme Court, if the circumstances had been alike.

An examination of another case cited by counsel, (*Sheldon v. Wright*, 1 Seld., 5 N. Y., 497) shows that no such point as the one before us was decided, and the observations of the Judge who pronounced the opinion favorable to such a construction of the statute as contended for by appellant, were followed by a disclaimer of such ground of decision. (21 N. Y. 157.) However, the question was passed on in a later case, (*Olcott v. Robinson*, 21 N. Y. 150) and the majority of the Court, five of the eight Judges, gave indorsement to the error of Judge Foote in the case of *Sheldon v. Wright*, (*supra*) in treating the case of *Bachelor v. Bachelor* as in point; and upon that idea, overruled the *anonymous* case in 1 Wend.; whereas, it is shown as a matter of fact no such question was made or considered in the Massachusetts case, nor indeed can I understand how the point could possibly arise upon the phraseology of the order then in question. Therefore, but trifling value can be given to either of the cases relied on as authority for appellant, and especially in the face of the more thoroughly considered adverse opinions in the cases herein cited from the decisions of the Supreme Courts of the United States and of California.

The Court below in its computation of time excluded the first day of the publication and posting of the notices, and included the day of election. This I think was proper, although the authorities are by no means uniform regarding the question. In the case of *Early v. Doe*, (*supra*) it appears that the learned Justice (Nelson) took a different view of it, and included both the first and last days, whilst other instances are found where the first day is included and the last excluded. In some States the matter is regulated by statute, but here we have no general act on the subject. Section four hundred and ninety-three of the Civil Practice Act provides that "the time within which an act is to be done, as provided in this Act, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." This section only applies, as will be seen, to the computation of time, "within which an act is to be done," under the particular statute, therefore it does not apply to the case in hand. But the

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rule stated, independent of statute, seems to prevail at this day in both English and American Courts, and perhaps it is correct to say in this State it has been unquestioned, wherefore it had better be followed, as it is not so important to the public how the rule is settled, as that it be settled.

This rule of construction pertains directly to the Act under consideration, but should also extend to other statutes falling within the reason and spirit of the rule. Governed by the rule thus stated it follows, the election being held on the fifth of August, that the first newspaper publication should have been not later than Monday the fifteenth of July, and the notice posted on or before Tuesday the sixteenth of July.

The findings of the Court, in respect to the next point, as to the posting of notices, should not be disturbed. The only proof introduced by plaintiff was the assessment roll. Authority to assess and collect a tax for the purposes stated is derived from the statute itself, and depends on precedent acts and conditions. The election must be called by the Board of Trustees; notice must be posted, and under the circumstances of the case be published in a newspaper for the time specified; the election to be held, and a majority of the votes cast to be in favor of the tax; all of which should be shown in the complaint, and if controverted be established by competent proof, of which the assessment roll constitutes no part. Appellant's counsel—no point being made on the pleadings—insists that the assessment roll allowed as evidence under defendant's exceptions was sufficient to establish his case in the first instance. I do not so understand the law. It makes the assessment roll "*prima facie* evidence * * * * to prove the assessment, property assessed—the delinquency—amount of tax due and unpaid, and that all the forms of law in relation to the assessment and levy * * * * have been complied with." (Stats. 1865, 423, Sec. 36; Stats. 1865, 267, Sec. 34.)

The assessment roll contains nothing except the names of the tax payers, description of property, value of property, and amount of tax. The "forms of law" referred to have no reference to the acts which must necessarily precede and upon which the assessment is founded in cases like this. The evidence in the case tending to

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disprove the posting of notices coming from defendant was wholly unnecessary, but when before the Court was proper to be considered. The especial features of this proof need not be examined in detail. The evidence of both the witnesses on this point, although not expressed in positive, unqualified terms as to the dates of particular transactions, yet such evidence is given as their best recollection, and qualified only to that degree usually exhibited by reliable and conscientious men when testifying in such matters and having no certain or reliable data to fix the memory definitely upon the time. If either or both the witnesses could possibly be mistaken, any doubt as to their remembrance is not enhanced by the circumstance of plaintiff failing to call Mr. Bence as a witness on the point of time when such notices were posted, he being shown to be the one who did this service.

I have no doubt that the evidence warranted the findings of the Court on this point. The appellant attacks the findings, and upon it devolved the necessity of showing error, which in my judgment has not been done; wherefore, upon principle governing in such cases, this Court should not interfere.

No question was made on appeal—in fact, the point was expressly waived—as to whether an action can properly be brought in the name of the State for the purpose of enforcing the collection of a special school tax; and therefore the circumstance of the Court having consented to hear the case brought in this way must not be accepted as a determination of such question by the Court.

I appreciate the beneficial purposes for which this tax was intended, and would not allow my judgment, were the question one merely of technical or immaterial moment, to thwart the wishes of the people of the district as expressed in their election. But this is not such a case. The tax can be imposed on the property of the citizen only in the way and manner the law has appointed, and among the most important conditions are that the tax shall be imposed by means of a majority vote of the district. This election is authorized on the fundamental condition that the people of the district and property owners shall be notified thereof in recognition of the familiar maxim of the law: "That notice is of the essence of things required to be done." The mode and manner of imparting such notice is clearly

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pointed out in the Act, and when the agents of the law have so far misunderstood their duty as to omit giving notice as prescribed, and the tax for such reason is refused, the Courts are powerless to remedy the mischief.

The judgment and order of the District Court should be affirmed.

By BEATTY, C. J.:

Two points arise in this case: one as to a pure matter of law; the other, rather as to a question of fact. The first question is, whether a law which requires an advertisement of an election to be inserted in a newspaper "once a week for three weeks," can be complied with without having the first insertion in the paper twenty-one days before the proposed election. Upon this subject there is a difference of opinion between my associates; and as the question is one of some interest, and on which there is some little confusion of authorities, I propose to give my separate views. The word "week," both in laws and in common conversation or writing, has two separate and distinct meanings. Sometimes, week means a period of time commencing on Sunday morning and ending Saturday night at midnight: at other times we use the term as signifying a period of time of seven days' duration, without any reference to when that time commences, whether on Sunday, Monday, or Saturday. For want of a better mode of distinguishing these two kinds of weeks, I shall call that week which commences with Sunday and ends with Saturday a biblical week; the other I shall in this opinion call a secular week.

A few examples will show with what distinct meanings the word is used. If a party should on Thursday of any week contract to do a certain thing before the end of *this week*, no Court would hesitate to say it must be done before midnight of the following Saturday, or within two days and a fraction—the language having reference to a biblical week. But if the party contracted to do the same thing within *a week*, then he would have full seven days within which to accomplish it. In the latter contract, week would simply mean a period of seven days. If a law required a certain thing to be advertised "one day in each of three successive weeks," the most stupid person could hardly fail to see that biblical weeks

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were meant; and that an advertisement inserted, say, on Saturday the first, Monday the third, and Monday the tenth, of a certain month, would be a full compliance with the law; that the advertisement was completed on the expiration of the tenth day of the month. On the other hand, if the law required a thing to be advertised "for the full period of three weeks by not less than one insertion weekly in a newspaper," "week" in the first clause of the sentence would according to all the cases mean a period of seven days, and have no reference to the biblical week. Under such a law the full period of twenty-one days would have to elapse after the first advertisement before the law would be complied with. But there would be no necessity for the passage of three complete biblical *weeks* to make the advertisement complete. To illustrate: The first notice might be inserted Thursday the first, of a given month; the second, Thursday the eighth; and the third, Thursday the fifteenth—the three weeks would expire Wednesday the twenty-first; and any sale that was to be preceded by the three weeks' advertisement could take place on Thursday the twenty-second of the month. From Thursday the first to Sunday the fourth would only be the fraction of a biblical week. The first full biblical week would commence with Sunday the fourth, and end with Saturday the tenth; the second would commence Sunday the eleventh, and end with Saturday the eighteenth. Then, there would be another fraction of a biblical week between that and the twenty-second.

I have thus attempted to illustrate the different meanings which we are compelled to attach to the word "week," in laws regarding periods of time for advertising. If we could in reading any law say, whether "week" meant a biblical week, or simply a period of seven days, we would generally be past the greatest difficulty in interpreting such law. But unfortunately, this point is frequently a very difficult one; and even after this preliminary question is settled, it does not always relieve a case of this kind of doubt. The phrase "once a week," in the law under discussion, in my opinion has reference to a biblical week; and the phrase "for three weeks," in the connection in which it stands, is only equivalent to "for three insertions," or taking them both together for one day in each of three biblical weeks. This interpretation I will

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endeavor to show is supported by many authorities, and controverted by not one that I have been able to find. As the authorities on this subject have been much more fully collated by Mr. Justice Johnson in his opinion than in the briefs, I will notice the different cases to which he refers. The first case is that of *Olcott v. Robinson*. This was a case heard in the Court of Appeals of New York, consisting of eight Judges. Two opinions were written—five concurring in the majority opinion, and three in the dissenting opinion. It is not denied that the majority of the Court sustain the views I have expressed: but it is contended the minority opinion is adverse to these views; and that this opinion is supported by better reason and numerous authority. The New York law on which that Court was deciding, was in these words: “Shall be publicly advertised previously for six weeks successively, as follows: 1st. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold. 2d. A copy of such notice shall be printed once in each week in a newspaper of such county, if there be one.”

This section of the law, it will be observed, is divided into three distinct clauses. The first clause clearly has reference to the length of time the advertisement must be continued. All the Judges seem to agree (and from the reading of the first clause of the law there was no room for doubt on this point) that the advertisement therein spoken of, must last for full forty-two days before the sale. But the majority of the Court hold that the advertisement called for in the first clause of the section was complied with by posting the notices in three public places; that the third clause of the section quoted, which has reference to the printing, must be interpreted by itself; and that clause, standing alone, does not require that the first insertion should have been six secular weeks, or forty-two days before the sale. It is sufficient if there were six insertions—each one of which was in a different biblical week, and the last one at least the day before the sale—although between the first insertion and the day of sale there may have been only five weeks and a fraction.

The opinion of the minority of the Court, delivered by Chief Justice Comstock, is to the effect that the advertisement spoken of

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in the first clause is not completed by the posting of the notices: but that it takes two things—the posting and the printing; that the first and third clauses are so inseparably connected that the advertisement—which is required to be of a certain duration, to wit: forty-two days, or six secular weeks—cannot be made effectual unless that period shall have elapsed between the printing of the first notice and the day of sale. The Chief Justice does not controvert the proposition that the majority opinion is correct as to the interpretation of the third clause if it stand alone. Here, then, is clearly the opinion of five Judges of the Court of Appeals that the third clause of the New York law, referred to, should be interpreted as I interpret the clause in our law. The words in our law, and those in the third clause of the New York law, are not identical, but very similar. The dissenting opinion does not controvert this particular point, and therefore has no bearing on this case.

The next case cited by Mr. Justice Johnson, as supporting the proposition that the first insertion in the newspaper must have been at least twenty-one days before the election, is a case in 1 Wendell, page 90. In that case, the Court held that when the law required a notice to be published “six weeks successively,” it meant that it should be published forty-two days. I have no quarrel with that decision. I am rather inclined to think it right. The word “weeks” there was probably meant to be used in its secular rather than its biblical sense; but that has very little bearing on this case. The phraseology there is entirely different from that used in our law. There is certainly not near so close a resemblance between the language of that law and our law, as between the expressions “six square miles,” and “six miles square”; yet every school boy knows the former expression is equivalent to six sections of land, or three thousand, eight hundred and forty acres; the latter, thirty-six sections, or twenty-three thousand and forty acres. But even if this case in 1 Wendell is at all in conflict (which I do not admit) with the views I have expressed, it is opposed to the case of *Bachelor v. Bachelor*, (1 Mass. 256) where the Court held that “three successive weeks” does not mean twenty-one days, or what would be, as the term is used in this opinion, three secular weeks; but that the law was fully satisfied by one insertion Saturday, June

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thirtieth; one Saturday, July seventh; and the third Wednesday, July eleventh. The Court, in this latter case, hold that such a law is fully satisfied by three insertions in a newspaper, if each of these insertions be in successive biblical weeks; in other words, the whole time between the first and last insertion need not exceed ten days.

In the case in 16 Barbour, page 347, the law under which the advertisement was to be made is not given. But the counsel on both sides concede that the law requires a publication of eighty-four days, or twelve full secular weeks; there was no question on that point. The question was whether a certain affidavit showed that the notice of sale had been published for twelve full weeks. The Court held it did not show such fact. This case has no bearing on any point in the case before us.

The case of *Ronkendorf v. Taylor* (4 Pet. 349) is direct in point to establish one proposition for which I contend, and which is the key to the whole case before this Court; that is, that the phrase, "once a week," in all laws similar to the one under discussion, means *once in each biblical week*, and not every seventh day. Upon this point this discussion is clear and explicit; there is not a decision to be found anywhere, that I am aware of, which controverts this proposition. This interpretation is so entirely in accordance with the common usage of that term, that I doubt if this decision will ever be questioned by any respectable tribunal. As this is the important point in this case I make the following quotation from 4 Peters, to show that it is clearly and unequivocally settled:

"By the tenth section of the Act of Congress which directs this proceeding, the Collector is required to give public notice of the time and place of sale, by advertising once a week in some newspaper printed in the City of Washington, for three months, when the property is assessed to a person who resides within the United States, but without the District of Columbia. Notice of the sale of the lot in controversy was given by the Collector; first, in a newspaper published the sixth of December, 1822; the last, in the same paper of the tenth of March, 1823. These periods embrace the time the advertisement is required to be published; but it is contended that the notice was not published once in each week, within

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the meaning of the Act of Congress. In examining the dates of the publications, it appears that eleven days at one time transpired between them, and at another time ten days, at another eight.

“These omissions, it is contended, are fatal; that the publication being once made, it was essential to the validity of the notice that it should be published every seventh day thereafter. The words of the law are “once a week.” Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until Tuesday the week succeeding? The object of the notice is as well answered by such a publication, as if it had been made on the following Monday.

“A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction, the notice in this case must be held sufficient. It was published Monday, January the sixth, and omitted until Saturday, January the eighteenth, leaving an interval of eleven days; still, the publication on Saturday was within the week succeeding the notice of the sixth. It would be a most rigid construction of the Act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a week. If published once a week, for three months, the law is complied with and its object effectuated.” Upon other points in this case this opinion has no bearing.

The next case cited by Justice Johnson is *Early v. Doe*, (16 How. 610) where, according to his understanding of the decision, the Court held “that notice of a tax sale once in each week for twelve successive weeks is not given unless the first notice precede the sale eighty-four days.” This case he thinks is more directly in point than any case he could find. If the Court had held as he says, it would be a case in point in favor of his views. But in the case referred to there was but one written opinion delivered or reported, and that is the opinion of Mr. Justice Wayne. He holds that where the statute requires the insertion of a notice in a newspaper “once in each week for *at least* twelve successive weeks,” the first insertion must be *at least* eighty-four days before the sale. But he makes the whole decision rest on the two words “at least,” and admits that if those words were omitted, and the law simply

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read "once in each week for twelve successive weeks," it would require an entirely different interpretation. I quote from the opinion, a few sentences in advance of the quotation made by my associate :

"We do not doubt, if the statute had been 'once in each week for twelve successive weeks,' a previous notice of the particular day of the sale having been given to the owner of the property, that it might very well be concluded that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient. But when the legislator has used the words, "for at least twelve successive weeks," we cannot doubt that the words at least, as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks, or eighty-four days."

This law, leaving out the words *at least*, is precisely similar to the law I am considering. Our law says "once a week," this law says once *in each* week. There is no substantial difference. Our law, in the last part of it, says "for three weeks," the other "for twelve *successive* weeks." Here there is no material difference. This law, so similar to our own, in the opinion of Justice Wayne, with the words "at least" left out, should be interpreted just as I interpret the Nevada law. Although this opinion directly sustains my views, I do not consider it of much importance, because the whole reasoning of Mr. Justice Wayne in this case is singularly confused and unsatisfactory. I only claim it is not, and cannot by any possibility, be held an authority against my views. I do not understand the words *at least* to have any such significance as is attached to them by Justice Wayne, and I do not believe that where the law requires an advertisement to be inserted in a newspaper "once a week for twelve weeks" before a sale, that the sale can take place on the day of the last insertion. If so, the sale might take place in the morning of the day of the last publication and the paper not be issued until the afternoon.

The case cited from 32 California has not the most remote bearing on this case, or any point arising therein.

To recapitulate: our statute requires an advertisement to be inserted in a newspaper "once a week for three weeks." The case

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cited from 4 Peters, 349, holds clearly that "once a week" for three months means each biblical week—that is, once between each Sunday and Saturday night—and that the particular time of the week makes no difference. The first insertion might be Monday, the first of a month, and the second Saturday, the thirteenth; the third Monday the fifteenth, and so on to the end of the chapter.

The expression "once a week" means once in each biblical week. "For three weeks," I admit, if standing alone, might mean either for twenty-one days or for three biblical weeks. But connecting it with the foregoing part of the sentence, and it can mean nothing but biblical weeks. The sentence then may be interpreted to read thus: shall be inserted in a newspaper once in each biblical week *for three weeks*. That is, for one day of each of three biblical weeks. To my mind, this is the true interpretation pointed out by the language of the law and sustained by all the authorities, so far as they bear on this question. There is no connection between this part of the law and that which requires the notices to be posted. The notices are not required to be posted for three weeks, but only for twenty days.

The other point in this case is whether the testimony supports the finding of fact by the Court in relation to the posting of notices. The Court below held very properly, in my opinion, that the introduction of the assessment roll was all the evidence that the law requires to make out a *prima facie* case for the appellant. The burden of proof then was thrown on the defendant to show that the tax was not regularly assessed. The Court found, as a matter of fact, that the notice of the election was not posted for twenty days prior thereto in three of the most public places in the district.

Where the law requires a notice to be posted by a public officer for a certain length of time before any act is done, it will, in the absence of proof to the contrary, presume the officer did his duty. In this case it is admitted that the proper notices were posted, that they bear date the fifteenth of July, and the posting was in time if even done on the sixteenth of July. But it is claimed the proof shows the posting was not done until after the sixteenth of July. In my opinion, the proof does not show any such fact; it is hardly sufficient to show a suspicion that such may have been the case.

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S. E. Jones, one of the School Trustees, first testifies, in substance, that he was appointed to post and have published the notices of election. His exact language in regard to that posting was as follows: "Some time after this meeting [the meeting when he was appointed or requested to give the notice] I *think* on the fifteenth of July, 1867, the day the notice bears date, Mr. Bence and myself prepared the notices; we prepared them at Empire * * A short time after notice was prepared—don't remember the day—Mr. Bence, who was going down the river for the purpose of assessing, at my request, took with him and, as I understood, posted the notices. The notice was not posted on the day it was prepared. * * I handed copy to the editor of the *Appeal* for publication myself. I think I handed copy to *Appeal* on the evening of the same day, or on the day after the notices were posted by Bence." This is all the testimony in relation to the posting of the notices, except that of Mr. Robinson, which I will notice presently.

What does this testimony amount to when analyzed? Jones helped to prepare the notices; he *thinks* they were prepared the day they were dated. This, one would naturally *suppose* or *think*, merely from the date. The testimony amounts to but this: he did not recollect that the notices were either ante-dated or post-dated. It amounts to but little more. He knows, too, that notices were not posted the day they were written. Now this is all his testimony bearing directly on this question. A reference to the calendar (and the Court may always take judicial notice of the course of time) shows that the fifteenth of July, 1867, was Monday. If the notices were written on Saturday or Sunday, knowing that they could or would not be posted on the day written, nothing would be more natural than to post-date them, as of the next Monday. Business men in preparing notices on Sunday to be used the next day almost always date them as of Monday. This circumstance does not seem to have been called to the attention of the witness, and probably was not observed at the time of the trial, either by the Court or counsel. Yet, in my mind, it is a strong circumstance tending to show the witness was mistaken in supposing the notices were dated the day they were written. But even if the notices

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were written as well as dated on Monday the fifteenth, the witness only says they were not posted the day they were written. He does not pretend to say they were not posted the next day. Then this evidence of Jones, unconnected, is clearly insufficient to overcome the legal presumption in favor of the regularity of the posting.

It is claimed, however, that the testimony of Mr. Robinson, connected with that of Mr. Jones, makes a stronger case. I cannot so see it. The following is all the testimony of Mr. Robinson having the least bearing on this point: "I am one of the publishers of the Carson *Daily Appeal*; that notice [the notice for school election] was inserted in the *Appeal* the first time on the nineteenth day of July, 1867. I do not remember when it was handed in for publication, though I think it was on the eighteenth." Jones says he handed copy of notice to the *editor* of the *Appeal* himself. He *thinks* it was handed to the *Appeal* the evening of the day or the day after it was posted. The last legal day for posting was the sixteenth. If, says respondent, Robinson was right in *thinking* that the notice was handed in to the *Appeal* for publication on the eighteenth, and Jones was right in *thinking* that he handed it in to the *Appeal* the day or the day after Bence put up the notices, the posting must have been as late as the seventeenth, which was one day too late. It is claimed that this is some proof, and if there is any proof to sustain the finding it must be upheld.

In the first place, I deny that this is any proof at all. The opinions of a witness, except in a few cases, such as the opinions of experts, etc., are not legal evidence. The recollection of witnesses may be. The language used by Jones is not certainly what ought to have been used to be perfectly satisfactory. When he said, *I think* I handed copy, etc., if he meant to convey the idea that that was his recollection of the time, the testimony was competent, though the most accurate language to convey his idea was not used. Taking his whole language together this is, perhaps, the idea he meant to convey. This testimony may be entitled to its due weight, but the testimony of Mr. Robinson is quite different. He says he was "one of the publishers;" he does not say he was "the editor" of the *Appeal*. He states distinctly he does not *remember* when the notice was handed in for publication. He thinks it was the eight-

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eenth. He might have thought it was the eighteenth because some one told him so. This would not be evidence. His opinion, when it is shown clearly it was not based on memory or recollection, was not evidence.

But this is not the only objection to this testimony. Even if the *opinions* of these two witnesses are to govern in such a case the connecting link between the two must be properly supplied. Jones does not say either that he gave the notice to Robinson, to the publishers, or either of the publishers, of the *Appeal*. He gave it to the *editor* of the *Appeal*. Certainly Mr. Robinson does not show that he was the editor of the *Appeal*. He only shows that he was one of the publishers. The evidence does not show, but rather contradicts, the idea of the notice having been handed to Robinson. The editor of the *Appeal* may have kept the notice in his pocket for several days before Mr. Robinson or any of the publishers saw it. You cannot connect the testimony of Jones and Robinson to prove anything in regard to the time of handing in the notice, without the intermediate link, to wit, the editor. But no editor is introduced. Neither is Mr. Bence, who posted the notices, introduced. To my mind, then, there is an utter failure on the part of the defendant to prove what was attempted to be proved, to wit, that notices were not posted for twenty days.

Believing there is no legal evidence to support this finding, I shall not go into any minute examination of how far this Court may go in weighing the testimony upon which a verdict or finding is given. In general terms, I will say, the Court ought not to sustain a finding of any particular fact unless there is sufficient evidence to produce a reasonable presumption of its truth in the mind of a person of ordinary intellect and capacity—especially when that fact is in opposition to a legal presumption.

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7. **JUDGMENTS NOT DISTURBED ON MEAGER GROUNDS.** In an action against Buckland as surviving partner of the firm of Buckland & Bethel, it appeared in evidence that, in addition to the business of the firm, each of the partners was also engaged in separate business on his own account; that Bethel, being about to depart for San Francisco with the intention of laying in a stock of goods for the firm, Roney delivered to him a package of United States treasury notes and securities; that on his way to San Francisco Bethel lost his life; that after Bethel's death, Roney endeavored to collect his claim from his estate; and it did not appear what had become of the notes and securities after their delivery to Bethel: *Held*, that the evidence to show a delivery to or for the firm was too meager to justify a disturbance of the finding of the Court below in favor of the defendant. *Roney v. Buckland*, 219.
8. **OBJECTION THAT FINDINGS ARE CONTRARY TO EVIDENCE.** Where the ground of an appeal is that the findings of fact are contrary to the evidence, the burden of showing error is upon the appellant, and a meager showing is not sufficient. *Roney v. Buckland*, 219.
9. **PREJUDICIAL ERROR ONLY AVAILABLE ON APPEAL.** Though improper evidence may be admitted on the trial of a case, yet if its admission could in no wise injure the opposite party, he has no cause of complaint therefor—no error, except such as may have prejudiced appellant's case, being available on appeal. *Todman v. Purdy*, 238.

10. **NO APPEAL ON FINDINGS EXCEPT BY STATEMENT.** Findings are no portion of the judgment roll, nor is there any statutory provision for their introduction into the transcript on appeal under a Clerk's certificate; they must therefore be brought up, if at all, by means of a statement; and if not so brought up they cannot be considered. *Imperial Silver Mining Company v. Barstow*, 252.
11. **RECORD ON APPEAL FROM ORDER GRANTING OR REFUSING NEW TRIAL.** On appeal from an order granting or refusing a new trial, the Appellate Court is confined in its investigations to the record used on the motion in the Court below. *Caldwell v. Greely*, 258.
12. **APPEAL FROM PROCEEDINGS SUBSEQUENT TO ARGUMENT ON MOTION FOR NEW TRIAL.** Proceedings occurring after the argument on motion for new trial can be brought to the attention of the Appellate Court only by means of a statement on appeal setting them out. *Caldwell v. Greely*, 258.
13. **APPEAL FROM ORDER REFUSING AMENDMENT TO STATEMENT ON NEW TRIAL.** Where, after argument on motion for new trial, a motion was made to amend the statement, which was refused, and the transcript on appeal contained no further statement than that used on the motion for new trial: *Held*, that the merits of the application to amend could not be inquired into by the Appellate Court. *Caldwell v. Greely*, 258.
14. **POINTS INVOLVED ON APPEAL FROM NEW TRIAL ORDER.** All points which could be urged in the Court below on a motion for a new trial, either for or against it, including objections to the statement, may be raised on appeal from the order granting or refusing it without any further statement. *McWilliams v. Herschman*, 263.
15. **APPEAL ON CONFLICT OF EVIDENCE.** A judgment will not be set aside by the Supreme Court on the ground of being contrary to the evidence, where there appears to be a conflict of evidence, unless there be such a decided preponderance against it as to create a conviction that it was the result of mistake or misconduct. *Covington v. Becker*, 281.
16. **ERRORS OF TRANSCRIPTION IN RECORD ON APPEAL.** On an appeal in a criminal case, where it was plain from the context that the charge to the jury as contained in the transcript was not correctly transcribed: *Held*, that the Appellate Court had no alternative but to accept it as given in the form in which it appeared in the record. *State v. McGinnis*, 337.
17. **STATEMENT NOT CONTAINING ALL THE EVIDENCE.** A verdict will not be set aside as being unsupported by the evidence, where the statement does not affirmatively show that it embodies all the material evidence bearing upon the facts found in the verdict. *Sherwood v. Sissa*, 349.
18. **PRESUMPTIONS IN FAVOR OF INSTRUCTIONS GIVEN.** It will be presumed by the Supreme Court on appeal, unless the contrary be shown, that all instructions given by the District Court to the jury were pertinent to the issues and the evidence. *Sherwood v. Sissa*, 349.

19. **PRESUMPTIONS AGAINST INSTRUCTIONS REFUSED.** If an instruction be refused, which, under any state of facts, would be correct, and it be shown to be pertinent to the issues, such refusal is error; but if the instruction would be incorrect under some state of facts, and it be not shown that such was not the case, it will be presumed to be incorrect, as applied to the case made out. *Sherwood v. Sissa*, 349.
20. **OBJECTIONS NOT TAKEN BELOW NOT AVAILABLE IN APPELLATE COURT.** On appeal from an award of compensation for land taken for railroad purposes, objections that the commissioners did not meet at the time fixed, and did not file their report within the period allowed by the Court, cannot be taken for the first time in the Appellate Court. *Virginia & Truckee Railroad Co. v. Elliott*, 358.
21. **APPEAL ON GROUND OF VERDICT AGAINST EVIDENCE—CONFLICT OF TESTIMONY.** An Appellate Court will not disturb the verdict of a jury on the ground that it is not supported by the evidence, if there is a material conflict in the evidence and there is some substantial testimony to support it. *State v. Yellow Jacket Company*, 415.

APPEAL AS TO ALLOWANCES TO EXECUTORS FOR REPAIRS, EXPENSES, &c.—
see **EXECUTORS, &c.**, 3, 6.

FINDINGS EQUIVALENT TO VERDICT, ON APPEAL—see **FINDINGS**, 2.

APPEAL FROM NEW TRIAL ORDER—FATAL DEFECTS IN STATEMENTS—see **NEW TRIAL**, 4.

DISTINCTION AS TO WEIGHT OF EVIDENCE ON NEW TRIAL AND ON APPEAL—
see **NEW TRIAL**, 7.

WAIVER OF ERRORS TO BE SHOWN BY PARTY CLAIMING WAIVER—see **WAIVER**, 1.

APPOINTMENT.

APPOINTMENT TO NEW COUNTY OFFICES—see **OFFICES AND OFFICERS**, 1.

APPOINTMENT TO OFFICE BY BOTH LEGISLATURE AND GOVERNOR—see **OFFICES AND OFFICERS**, 2.

APPOINTMENT TO TAKE EFFECT AT FUTURE DAY—see **OFFICES AND OFFICERS**, 3.

APPRAISERS.

OBJECTIONS TO APPRAISERS NOT VALID AGAINST EXECUTORS' ACCOUNTS—see **PROBATE**, 4.

APPROPRIATIONS.

1. **APPROPRIATION IN ANTICIPATION OF RECEIPT OF PUBLIC REVENUE.** The public revenues may be appropriated by the Legislature in anticipation of their

receipt, as is done in the Legislative Fund Act of 1869, (Stats. 1869, 54) and it is not necessary to the validity of such an appropriation that funds to meet it should be in the treasury. *Ash v. Parkinson*, 15.

APPROPRIATIONS OF LAND AND WATER—see LANDS, 2.

TOWN-SITE APPROPRIATIONS—see LANDS, 3.

APPROPRIATION OF RIGHT OF WAY NOT AN APPROPRIATION OF TRACT OF LAND—see NOTICE, 1.

ARGUMENT.

ADMISSION OF COUNSEL IN ARGUMENT—see ATTORNEYS, 1.

ASSESSMENTS.

PAYMENT OF ASSESSMENTS ON MINING STOCKS BY EXECUTORS—see PROBATE, 6.

ASSESSMENTS FOR TAXES—see TAXES, 1, 2, 4, 6, 8, 9, 10.

ASSIGNMENT OF ERRORS.

ASSIGNMENT OF ERRORS IN STATEMENT ON APPEAL—see APPEALS, 5, 6.

ASSIGNMENT OF ERROR AS TO JUDGE'S CHARGE AS AN ENTIRETY—see NEW TRIAL, 1.

ASSIGNMENT OF ERRORS IN STATEMENT ON NEW TRIAL—see NEW TRIAL, 3, 4, 5, 6.

ATTACHMENT.

ATTACHMENT OF CORD-WOOD CUT UNDER CONTRACT—see CONTRACTS, 1.

ATTORNEYS.

1. ADMISSIONS OF COUNSEL IN ARGUMENT. Upon a grave question involving the public interest, the mere admission of counsel will not relieve the Court from its consideration. *Ash v. Parkinson*, 15.

COUNSEL FEES AS DAMAGES ON INJUNCTION BONDS—see INJUNCTION, 2.

AUDITOR.

1. COUNTY WARRANTS ISSUED NOT AFFECTED BY SUBSEQUENT INJUNCTION. An injunction, to restrain the issuance of warrants by a County Auditor, cannot affect parties interested in warrants already issued by him. *Webster v. Fish*, 190.

POWERS OF AUDITOR AS TO PAYMENT FOR ROADS AND BRIDGES—see ROADS AND BRIDGES, 1.

BANKRUPTCY.

1. **SUSPENSION OF LEGAL PROCEEDINGS BY BANKRUPTCY.** The suspension of legal proceedings against a person declared a bankrupt, as provided for by the United States bankrupt law, does not affect or modify his obligations, but only temporarily suspends the remedy for their enforcement. *Tinkum v. O'Neale*, 93.

CONTINUANCE WHERE JOINT DEBTOR DECLARED BANKRUPT—see **JOINT DEBTORS**, 1.

ACTION AGAINST PARTNER WHERE COPARTNER DISCHARGED IN BANKRUPTCY—see **PARTNERSHIP**, 8.

BOARD OF EQUALIZATION.

1. **BOARD OF EQUALIZATION OF SPECIAL AND LIMITED JURISDICTION.** The Board of Equalization is of special and limited jurisdiction, and its record must show affirmatively the necessary jurisdictional facts. *State v. County Commissioners of Washoe County*, 317.
2. **EQUALIZATION—REDUCTION OF ASSESSMENTS.** Under the Revenue Act of 1866 (Stats. of 1866, 168, Sec. 15) the Board of Equalization has no power to reduce an assessment when the person complaining has refused to give the assessor a statement under oath of his property. *State v. County Commissioners of Washoe County*, 317.

DIFFERENCE BETWEEN EQUALIZING BOARD OF COUNTY COMMISSIONERS AND BOARD OF EQUALIZATION—see **COUNTY COMMISSIONERS**, 1.

EQUALIZATION OF TAXES BY COUNTY COMMISSIONERS—see **TAXES**, 8, 9, 10.

BOARD OF EXAMINERS.

1. **FUNCTIONS OF BOARD OF EXAMINERS.** The institution of the Board of Examiners was not intended as a check on legislative extravagance, but to secure, as a pre-requisite to legislative action, an examination of such claims as require such action upon them as claims—not creative action, but adoptive or rejective action. *Ash v. Parkinson*, 15.
2. **CONCURRENCE OF EXAMINERS AND CONTROLLER.** So far as the examination of claims against the State is concerned, the Board of Examiners assist the Controller, acting concurrently; but they do not deprive him of his constitutional power or any portion of it. Each moves in a designated sphere—all tending to the desired result: the protection of the revenues of the State. *Lewis v. Doron*, 399.

CONSTITUTIONAL CLAUSE AS TO BOARD OF EXAMINERS—see CONSTITUTION, 4.

CLAIMS ALLOWED BY EXAMINERS TO BE PRESENTED TO CONTROLLER—see CLAIMS AGAINST STATE, 1.

EXAMINING POWERS OF EXAMINERS AND CONTROLLER—see CONSTITUTION, 21.

INCIDENTAL EXPENSES OF LEGISLATURE—see LEGISLATURE, 4, 5.

BONDS.

DAMAGES ON INJUNCTION BONDS—see INJUNCTION, 2.

ORMSBY COUNTY RAILROAD BONDS. ACT CONSTITUTIONAL — see ORMSBY COUNTY, 1.

COUNTY BONDS FOR RAILROAD AID—see RAILROADS, 8.

TAXATION FOR INTEREST OF UNISSUED COUNTY BONDS—see TAXES, 5.

INTEREST ON VIRGINIA CITY BONDS—see VIRGINIA CITY, 2.

CASES APPROVED.

1. *STAININGER v. ANDREWS*, (4 Nev. 59) to the effect that a person claiming public land should be deemed in the actual possession of all within his marked boundaries while diligently prosecuting the work necessary to subject it to his dominion or control, cited with approval. *Robinson v. Imperial Silver Mining Company*, 44.
2. *EX PARTE CRANDALL*, (1 Nev. 294) as to the point that the authority of Congress to regulate commerce between the States is not exclusive but paramount when exercised, approved. *Western Union Tel. Co. v. Atlantic and P. S. Tel. Co.*, 102.
3. *LUCICH v. MEDIN*, (3 Nev. 93) to the effect that a decree of settlement of the accounts of an executor or administrator closed all further investigation in respect to all accounts allowed, except where some error or mistake appeared upon the record, approved. *Estate of Millenovich*, 161.
4. *RICHARDS v. HOWARD*, (2 Nev. 128) AND *CORBETT v. JOB et al.*, (*ante*, 201) on the point that findings will not be considered on appeal unless embodied in a statement, approved. *Imperial S. M. Co. v. Barstow*, 252.
5. *RANKIN v. NEW ENGLAND AND NEVADA Co.*, (4 Nev. 78) AND *YELLOW JACKET SILVER MINING Co. v. STEVENSON*, (*ante*, 224) as to the rule touching the liabilities of corporations upon contracts, approved. *Ellis v. Central Pacific Railroad Co.*, 255.

CASES OVERRULED.

1. **CHOLLAR POTOSI Co. v. KENNEDY**, (3 Nev. 361) in so far as it expresses an opinion that a foreign corporation is entitled to avail itself of the bar of the Statute of Limitations in an action concerning real property, disapproved and declared not the decision of the Court. *Robinson v. Imperial Silver Mining Company*, 44.
2. **GROSETTA v. HUNT ET AL.**, in so far as it expresses an opinion as to the necessity of filing a copy of survey with the Surveyor-General under the Statutes of 1852, (Utah Stats. 1852, 175) disapproved and declared not the decision of the Court. *Robinson v. Imperial Silver Mining Company*, 44.
3. **STATE v. WATERMAN**, (1 Nev. 543) in so far as it expresses an opinion that the rule there held, to the effect that a defendant in a prosecution for robbery is not required to produce preponderating proof to establish the facts of his defense, does not apply in cases of homicide, disapproved. *State v. McCluer*, 132.
4. **HOOPES v. MEYER** (1 Nev. 433) AND **GILLIG, MOTT & Co. v. THE LAKE BIGLER ROAD COMPANY**, (2 Nev. 214) on the point that a statement is not required to specifically state the errors relied on, disapproved. *Corbett v. Job*, 201.

CERTIFICATE.

CERTIFICATE OF SURVEY UNDER UTAH STATUTE—see CONSTITUTION, 9, 10.

CERTIORARI.

1. **CERTIORARI—PROVINCE OF THE WRIT.** The province of the writ of certiorari extends only to the question of jurisdictional power. *State v. County Commissioners of Washoe County*, 317.

CHARGE.

1. **INSTRUCTIONS NOT APPLICABLE TO CASE.** It is no error to refuse an instruction which is correct abstractly considered, when it is not applicable to the circumstances of the case. *State v. Ah Loi*, 99.
2. **CHARGES TENDING TO MISLEAD JURY IN CRIMINAL TRIALS.** Any ambiguity in the charge in a criminal case which may have a tendency to mislead the jury should entitle the accused to a new trial; for every person charged with a

public offense has the right to have the evidence weighed by the jury uninfluenced by the opinion of the Judge respecting it—in all respects to have a fair and impartial trial, free from every prejudicial irregularity, and from everything which may so involve the case as to render it difficult or impossible for the jury to arrive at an intelligent conclusion. *State v. McGinnis*, 387.

ERRONEOUS INSTRUCTIONS WHICH DO NO PREJUDICE—see APPEALS, 2, 3.

ERRORS IN TRANSCRIBING CHARGE FOR APPEAL RECORD—see APPEALS, 16.

PRESUMPTIONS IN FAVOR OF INSTRUCTIONS GIVEN—see APPEALS, 18.

PRESUMPTIONS AGAINST INSTRUCTIONS REFUSED—see APPEALS, 19.

CHARGE IN CRIMINAL CASE IGNORING CRIMINAL INTENT—see LICENSES, 1.

ASSIGNMENT OF ERRORS AS TO CHARGE—see NEW TRIALS, 1.

CLAIMS AGAINST STATE.

1. CLAIM ALLOWED BY EXAMINERS TO BE PRESENTED TO CONTROLLER. Where a member of the Board of State Printing Commissioners had a claim for his services passed upon and allowed by the Board of Examiners, but omitted to have it audited by the Controller; and the latter, for that reason, refused to issue his warrant upon the treasury for the amount so allowed: *Held*, that it was necessary to show a presentation of the claim for allowance to the Controller; and that, without such showing, the Controller would not be compelled by *mandamus* to issue his warrant. *Lewis v. Doron*, 399.

FUNCTIONS OF BOARD OF EXAMINERS AS TO CLAIMS—see BOARD OF EXAMINERS, 1.

CONSTITUTIONAL "CLAIM AGAINST THE STATE"—see CONSTITUTION, 5.

CONSTITUTIONAL DUTIES OF CONTROLLER AS TO CLAIMS AGAINST THE STATE—see CONSTITUTION, 19.

POWER OF CONTROLLER TO AUDIT CLAIMS AGAINST STATE—see CONTROLLER, 1.

INCIDENTAL EXPENSES OF LEGISLATURE—see LEGISLATURE, 4, 5.

CLERK.

TRANSFER OF RECORDS AND SUITS FROM LANDER TO WHITE PINE COUNTY BY CLERK—see MANDAMUS, 1.

NEGLECT OF CLERKS TO ENTER ORDERS—see RECORD, 1.

COMMERCE.

TELEGRAPHIC COMMUNICATION BETWEEN STATES "COMMERCE"—see TELEGRAPH, 1.

COMMISSIONERS.

COMMISSIONERS OF COUNTY—see COUNTY COMMISSIONERS.

SETTING ASIDE REPORT OF RAILROAD COMMISSIONERS—see RAILROADS, 5.

VALUATION OF LAND BY RAILROAD COMMISSIONERS—see RAILROADS, 7, 8.

CONSIDERATION.

RESULTING TRUST—PURCHASE OF LAND BY ONE, CONSIDERATION BY ANOTHER
—see TRUSTS, 1.

TIME OF ADVANCING CONSIDERATION TO CREATE RESULTING TRUST—see
TRUSTS, 2, 4.

RESULTING TRUST—ADVANCE OF CONSIDERATION IN CHATTELS—see TRUSTS, 8.

CONSTITUTION.

1. CONSTITUTIONAL CLAUSE AS TO GENERAL AND UNIFORM LAWS. The Legislative Fund Act of 1869 (Stats. 1869, 54) does not violate the constitutional clause providing for general and uniform laws where they can be made applicable, (Const., Art. IV, Sec. 21) because no general law could be made applicable to its subject matter. *Ash v. Parkinson*, 15.
2. CONSTITUTIONAL CLAUSE AS TO PUBLIC DEBT OF STATE. The Legislative Fund Act of 1869 was not in violation of the constitutional provision against contracting a public debt exceeding three hundred thousand dollars, (Const., Art. IX, Sec. 3) though then there was a public debt to that amount, for the reason that the Act did not create a debt within the meaning of the Constitution. *Ash v. Parkinson*, 15.
3. INTEREST ON "FIXED COMPENSATION" OF LEGISLATORS. The Legislative Fund Act of 1869, (Stats. 1869, 54) in so far as it provides for interest on warrants drawn for the pay of Legislators, is not repugnant to the constitutional provision regarding a fixed compensation to members of the Legislature, (Const., Art. IX, Sec. 33) for the reason that the interest, if any accrues, is to be paid not as compensation for services but as damages for delay. *Ash v. Parkinson*, 15.
4. CONSTITUTIONAL CLAUSE AS TO BOARD OF EXAMINERS—PAY OF LEGISLATORS. The Legislative Fund Act of 1869 is not repugnant to the constitutional provision as to the Board of Examiners, (Const., Art. V, Sec. 21) nor do the claims therein provided for require action by such Board. *Ash v. Parkinson*, 15.
5. CONSTITUTIONAL "CLAIM AGAINST THE STATE." A "claim against the State," within the meaning of the Constitution, (Art. V, Sec. 21) is a demand by some one other than the State against it for money or property; but when a claim

- originates with the State or in its behalf, and contemporaneously with its origin, means and manner of payment are provided as in case of a bond, it does not then constitute a claim proper against the State, but a liquidated and legalized demand against the treasury. *Ash v. Parkinson*, 15.
6. **WHITE PINE COUNTY ACT DOES NOT "REGULATE ELECTIONS."** The Act creating White Pine County and providing for its organization (Stats. 1869, 108) does not regulate the election of county and township officers, and is therefore not repugnant to section twenty, of article four of the Constitution. *Clarke v. Irwin*, 111.
 7. **MEANING OF "APPLICABILITY OF GENERAL LAWS" IN CONSTITUTION.** A general law, to be "applicable" in the sense in which the word is used in section twenty-one of article four of the Constitution, must answer the just purpose of legislation, that is, best subserve the interest of the people of the State, or, such class or portion as the particular legislation is intended to affect. *Clarke v. Irwin*, 111.
 8. **ELECTION OF WHITE PINE COUNTY OFFICERS.** The White Pine County Act (Stats. 1869, 108) does not violate section thirty-two of article four of the Constitution, requiring county officers to be elected by the people. *Clarke v. Irwin*, 111.
 9. **MEANING OF "VACANT" IN CONSTITUTION.** There is no technical or peculiar meaning in the word "vacant," as used in section eight of article five of the Constitution; it means empty, unoccupied, without an incumbent; and it applies to new offices never filled, as well as to old ones vacated by death, resignation, or otherwise. *Clarke v. Irwin*, 111.
 10. **CONSTITUTIONAL CONSTRUCTION.** Section two of the Act of 1869, providing for the transfer of certain records and suits from the county seat of Lander County to the county seat of White Pine County, (Stats. 1869, 137) though local and special in its nature, does not provide for changing the venue in any case, and is therefore not in conflict with section twenty of article four of the Constitution. *Hooten v. McKinney*, 194.
 11. **"MUNICIPAL PURPOSES," WHAT.** The words "municipal purposes only," as used in section one, article six, of the Constitution, restrict the jurisdiction to be exercised by Municipal Courts to such matters as relate to the affairs of the incorporated cities or towns where alone they are authorized to be established. *Meagher v. County of Storey*, 244.
 12. **MEANING OF "LOANING CREDIT."** To allow a county to loan its credit to a railroad company (Const., Art. VIII, Sec. 10) is virtually allowing a donation, because the right to loan its credit must involve the right to pay any liabilities which may be incurred by that means. *Gibson v. Mason*, 288.
 13. **MEANING OF "DUE PROCESS OF LAW."** By "due process of law," as used in section eight of article one of the Constitution, is meant such general legal

forms and course of proceedings as were known either to the common law, or as were generally recognized in this country at the time of the adoption of the Constitution. *Gibson v. Mason*, 283.

14. **MEANING OF "FOR ASSESSMENT AND COLLECTION OF TAXES."** The word "for" in section twenty of article four of the Constitution, which inhibits local or special laws "for the assessment and collection of taxes," means "with respect to," or "with regard to." *Gibson v. Mason*, 283.
15. **CONSTITUTIONAL CONSTRUCTION—REMOVAL OF JUDGES FROM OFFICE.** As the Constitution (Art. VII, Sec. 8) provides for the removal from office of Judges in a certain manner by the Legislature, such provision is exclusive and prohibitory upon the Legislature of other means for such removal. *O'Neale v. McClinton*, 329.
16. **CONSTITUTION—POWER TO APPOINT RAILROAD COMMISSIONERS.** On objection made that the appointment of commissioners to fix compensation for land taken for railroad purposes was a matter pertaining under the Constitution to the executive, and could not be exercised by the judicial department: *Held*, that, as the Constitution does not point out the manner in which private property shall be taken, the Legislature has the power to prescribe any method which will produce a just and fair result, and that there was no more reason why the commissioners should be appointed by the executive than by the judiciary. *Virginia & Truckee Railroad Co. v. Elliott*, 358.
17. **STATUTES TAKING AWAY CONSTITUTIONAL RIGHTS IN EFFECT.** A statute which makes the enjoyment of a constitutional right depend upon an impossible condition or upon the doing of that which cannot legally be done, is equivalent to an absolute denial of the right under any condition: the effect, and not the language of the statute in such case, must determine its constitutionality. *Davies v. McKeeby*, 369.
18. **ORDINARY SENSE AND IMPORT OF WORDS.** The Constitution is to be construed in the ordinary sense and usage of language, literally, unless some apparent absurdity, or obvious and manifest violation of the sense of the instrument, or unmistakable intent of its framers, forbids. *Lewis v. Doron*, 399.
19. **CONSTITUTIONAL DUTIES OF CONTROLLER.** The official name of "State Controller," as used in the Constitution, implies recognized duties appurtenant thereto, and means a supervising officer of revenue—among whose duties is the final auditing and settling of all claims against the State. *Lewis v. Doron*, 399.
20. **DEBATES OF CONSTITUTIONAL CONVENTION.** In the examination of constitutional questions, the debates of the constitutional convention may be consulted, as throwing light upon the subject; but they are not authoritative nor of any binding effect—it having been the text only that was adopted. *Lewis v. Doron*, 399.

21. **EXAMINING POWERS OF EXAMINERS AND CONTROLLER.** As the Constitution provides that "no claims against the State (except salaries or compensation of officers, fixed by law) shall be passed upon by the Legislature, without having been considered and acted upon by said Board of Examiners," (Const., Art. V, Sec. 21) it follows that the constitutional power of the Controller to examine such claims must be exercised, subject to such examination by the Examiners. *Lewis v. Doron*, 399.

CONSTITUTION AUTHORIZES LEGISLATIVE EXPENSES—see LEGISLATURE, 2.

LEGISLATIVE POWER TO APPROPRIATE MONEY—see LEGISLATURE, 3.

MEANING OF "ELECTION" AND "ELECTION BY THE PEOPLE" IN CONSTITUTION—see ELECTIONS, 1.

LEGISLATIVE POWER AS TO AIDING RAILROADS—see LEGISLATURE, 12.

APPOINTMENTS TO NEW OFFICES OR VACANCIES—see OFFICES AND OFFICERS, 1.

CONSTITUTIONALITY OF ACTS IN ISSUE THOUGH INDIRECT TRIAL OF RIGHT TO OFFICE—see OFFICES AND OFFICERS, 5.

REGISTRY LAW OATH UNCONSTITUTIONAL—see REGISTRY LAW, 2.

PRESUMPTIONS IN FAVOR OF CONSTITUTIONALITY OF STATUTES—see STATUTES, 3.

CONSTITUTIONALITY OF WHITE PINE COUNTY ACT—see WHITE PINE COUNTY, 1, 2.

CONSTRUCTION.

1. **PRESUMPTION OF CONSTITUTIONALITY OF STATUTES.** The presumptions are always in favor of the rightful exercise of the law-making power, and a statute will be sustained if there be any reasonable doubt of its unconstitutionality. *Ash v. Parkinson*, 15.
2. **CONSTITUTIONAL LANGUAGE—PREVIOUS CONSTRUCTION BY OTHER STATES.** Where language is employed in the Constitution similar to the language in the Constitution of other States, which had previously received judicial interpretation, the legal presumption arises that the language is used with reference to such interpretation. *Ash v. Parkinson*, 15.
3. **POLICY AND EXPEDIENCY OF STATUTES.** With the question of the policy or expediency of a statute the judicial department has nothing to do; in that regard the Legislature is supreme. *Ash v. Parkinson*, 15.
4. **ABUSE OF POWER NO ARGUMENT AGAINST ITS EXISTENCE.** That a power may be abused is no argument against either its existence or its exercise. *Ash v. Parkinson*, 15.
5. **CONSTITUTIONAL INTERPRETATION—COTEMPORANEOUS LEGISLATION.** In constitutional interpretation cotemporaneous legislation is always considered of force. *Ash v. Parkinson*, 15.

6. **COTEMPORANEOUS LEGISLATION AS TO LEGISLATIVE EXPENSES.** The constitutional provision relating to the Board of Examiners (Const., Art. V, Sec. 21) has been treated by cotemporaneous legislation as inapplicable to legislative expenses. *Ash v. Parkinson*, 15.
7. **CONSTRUCTION OF STATUTE—OFFICIAL ACTS BY EMPLOYEES.** Where a statute (Utah Stats. 1852, 175) provided that "the County Surveyor shall within thirty days after completing any survey make true copies, etc.": *Held*, that a survey, not made by the officer personally but by persons employed by him and acting under his direction, if adopted as his act and certified to by him as such, was a compliance with the law. *Robinson v. Imperial Silver Mining Company*, 44.
8. **REPEAL OF STATUTES.** The Statute of Utah Territory relating to settlements on public land (Utah Stats. 1852, 175; 1855, 176; and 1855, 271) which declared that in certain cases the Surveyor's certificate of survey should "be title of possession to the person or persons holding the same," gave to such certificate the character of a title as against all save the General Government; and after the laws had been complied with and a title obtained under them, the repeal of the laws could not destroy the title so acquired. *Robinson v. Imperial Silver Mining Company*, 44.
9. **CONSTRUCTION OF STATUTE—EXPRESSIO UNIUS, EXCLUSIO ALTERIUS.** The second section of the Statute of 1855 (Utah Stats. 1855, 176) in regard to County Surveyors, required them to keep a record of all surveys made and of all certificates given by them, and especially provided that "no certificate shall be valid unless filed in the Recorder's office, as provided for in this Act": *Held*, that if a certificate was duly filed in the Recorder's office, the omission to do any of the other acts imposed by the section would not invalidate it. *Robinson v. Imperial Silver Mining Company*, 44.
10. **CONSTRUCTION OF STATUTES—CERTIFICATE OF SURVEY.** Where a certificate of survey, made under the Statute of 1855, (Utah Stats. 1855, 176) stated that the survey was made for a certain person, naming him: *Held*, that it was a sufficient compliance with the portion of the statute requiring the certificate to certify "to whom given." *Robinson v. Imperial Silver Mining Company*, 44.
11. **PRESUMPTION OF CONSTITUTIONALITY OF STATUTES.** The power of determining whether a given statute is repugnant to the principles of the Constitution with which it is alleged to conflict belongs to the judiciary, and their decision is conclusive; but in all cases of doubt, every possible presumption and intentment will be made in favor of the constitutionality of the act in question. *Clarke v. Irwin*, 111.
12. **CONSTITUTIONAL CONSTRUCTION—ORDINARY MEANING OF WORDS.** Words used in a Constitution, unless qualified so as to alter their ordinary and usual meaning, must be received in such meaning. *Clarke v. Irwin*, 111.
13. **CONSTRUCTION OF STATUTES—POWER OF RECORDERS TO TAKE ACKNOWLEDGMENTS.** The fact that the Act of 1865 (Stats. 1864-5, 110, Sec. 68) authorizes Judicial

- Recorders to take acknowledgments of conveyances, does not take away a like power conferred on County Recorders by the Act of 1861. (Stats. 1861, 422.) *Ford v. Hoover*, 141.
14. **STATUTES IN PARI MATERIA SHOULD BE CONSTRUED TOGETHER.** Statutes relating to the same subject matter which can stand together should be so construed as to make each effective. *Ford v. Hoover*, 141.
 15. **STATUTORY CONSTRUCTION—TRANSFER OF JUDICIAL RECORDS.** The Act of 1869, providing for the transfer of certain records and suits from Lander to White Pine County, (Stats. 1869, 137) is not an Act regulating the practice of Courts of Justice. *Hooten v. McKinney*, 194.
 16. **CONSTITUTIONALITY OF STATUTES INVOKED ALWAYS ISSUABLE.** The constitutionality of a statute, under which any right is claimed in an action, may always be inquired into. *Meagher v. County of Storey*, 244.
 17. **STATUTORY CONSTRUCTION—OBJECT AND MEANS.** As it is a rule of construction that when anything is required to be done the usual means may be adopted for performing it, the Courts, in the interpretation of statutes, so construe them as to carry out the manifest purpose of the Legislature; and this has been done in opposition sometimes to the very words of an Act. *Gibson v. Mason*, 288.
 18. **ARGUMENT OF INCONVENIENCE.** The argument of inconvenience can have no weight in the construction of a law; or at most, only in the case of a very doubtful point. *O'Neale v. McClinton*, 329.
 19. **CONSTRUCTION OF REVENUE STATUTES AS IN PARI MATERIA.** Different Revenue Acts should, as far as possible, be construed as one Act; but the later one must control, if there be any conflict or inconsistency. *Virginia & Truckee Railroad Co. v. Commissioners of Ormsby County*, 341.
 20. **STATUTES RELATING TO DIFFERENT OFFICERS HAVING SIMILAR DUTIES.** There is no rule of construction which will authorize the application of provisions contained in any law respecting a certain officer or body, to another and different officer or body, although the laws be *in pari materia*, and the duties imposed upon such officers be similar in character. *Virginia & Truckee Railroad Co. v. Commissioners of Ormsby County*, 341.
 21. **CONSTRUCTION OF STATUTES—UNCONSTITUTIONALITY.** The form of a law by which a person is deprived of a constitutional right is immaterial; it is a nullity, whatever be its form. *Davies v. McKeeby*, 369.
 22. **CONSTITUTIONAL CONSTRUCTION.** In construing a Constitution, the thing to be sought is the thought expressed. *Lewis v. Doron*, 399.

ORDINARY SENSE AND IMPORT OF WORDS—see CONSTITUTION, 18.

THE LETTER OF CRIMINAL STATUTE AS OPPOSED TO THE REASON—see CRIMINAL LAW, 7.

CONSTRUCTION OF INSURANCE POLICIES—see INSURANCE, 5.

CONSTRUCTION OF NEW STATUTES OF LIMITATION—see LIMITATIONS, 4.

EXPRESSIO UNIUS EXCLUSIO ALTERIUS—see MAXIMS, 2.

CONTINUANCE.

CONTINUANCE WHERE JOINT DEBTOR DECLARED BANKRUPT—see JOINT DEBTORS, 1.

CONTRACTS.

1. CONTRACT TO CUT CORDWOOD—RIGHT OF PROPERTY. Hilger, having purchased certain standing timber, contracted with Gibbons to cut it into cordwood and deliver it at a certain place by a certain time, for which Hilger was to pay a certain price per cord, three-fourths of the payment thereof as fast as delivered, and the balance when all delivered; it being also agreed that if payment was not made on delivery, or within ten days afterwards, Gibbons was to be the owner of the wood; and, further, that he should have a lien upon it for his pay. After Gibbons had cut the wood it was attached as his property, and none of it was delivered as stipulated in the contract: *Held*, that the wood could not be held on attachment against Gibbons as his property. *Hilger v. Edwards*, 85.

2. EXCUSES FOR NONPERFORMANCE OF CONTRACT. Where a person contracted to deliver certain personal property by a specified time, and was prevented by its seizure under an attachment issued against him by a third person: *Held*, that legal difficulties of that kind constituted no excuse for a violation of his obligations under the contract. *Hilger v. Edwards*, 85.

3. CONTRACTS—LAW OF PLACE OF PERFORMANCE. A personal contract, which is, by its terms, to be performed in some place other than where it is made, is to be governed by the law of the place of performance. *Wilcox v. Williams*, 206.

CONTRACTS BY MUNICIPAL CORPORATIONS—see CORPORATIONS, 2.

INSURANCE CONTRACT—BURDEN OF PROOF—see INSURANCE, 2.

CONSTRUCTION OF INSURANCE CONTRACT—see INSURANCE, 5.

FORFEITURE OF RIGHTS AND LIEN UNDER CONTRACT BY NONCOMPLIANCE—see LIENS, 3.

EFFECT OF NEW STATUTES OF LIMITATION ON CONTRACTS—see LIMITATIONS, 3, 4.

PARTNERSHIP CONTRACTS JOINT—see PARTNERSHIP, 1.

CONTRACT TO BE PERFORMED IN NEVADA OR CALIFORNIA—see PROMISSORY NOTES, 2.

RIGHT OF PROPERTY ON EXECUTORY SALE OF CHATTELS—see SALES, 1, 2.

CONTROLLER.

1. **POWER OF CONTROLLER TO AUDIT CLAIMS.** It is the right and duty of the State Controller to audit all claims coming under the provisions of the Act of March 3d, 1869. (Stats. 1869, 158.) *Lewis v. Doron*, 399.

CLAIMS ALLOWED BY EXAMINERS TO BE PRESENTED TO CONTROLLER—see CLAIMS AGAINST STATE, 1.

CONSTITUTIONAL DUTIES OF CONTROLLER—see CONSTITUTION, 19.

CONSTITUTIONALITY OF ACT RELATING TO CONTROLLER—see STATUTES, 4.

CORPORATIONS.

1. **FOREIGN CORPORATION CANNOT PLEAD STATUTE OF LIMITATIONS.** Foreign corporations are within the exception of the Statute of Limitations as to persons absent from the State when a cause of action accrues against them. *Robinson v. Imperial Silver Mining Company*, 44.
2. **INCIDENTAL POWERS OF MUNICIPAL CORPORATIONS.** A municipal corporation, like a trading one, may, unless in some way restrained by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it, such as incurring debts, executing and giving promissory notes, and adopting all the ordinary or usual means which may be necessary to the full exercise, enjoyment, and discharge of its powers expressly given. *Douglass v. Mayor, &c., of Virginia City*, 147.
3. **CORPORATIONS—UNAUTHORIZED LEASE BY PRESIDENT—PRESUMPTIONS OF RATIFICATION.** Where the President of a mining corporation leased, in the name of the company but without its authority, certain of its mining ground, and the money paid as rent was returned as "money received for ores sold:" *Held*, that the mere fact of the receipt of the money, without proof of knowledge of the lease on the part of the company, was not sufficient proof from which to infer a ratification of the lease, nor a sufficient showing from which to infer the relation of landlord and tenant so as to entitle the occupant of the ground to notice to quit. *Yellow Jacket S. M. Co. v. Stevenson*, 224.
4. **CORPORATIONS NOT CHARGEABLE WITH KNOWLEDGE OF INDIVIDUAL TRUSTEES.** On a question as to the ratification by a corporation of the unauthorized act of its President, where it is necessary to show knowledge on the part of the corporation, it is not enough to show an individual knowledge on the part of the minority of the Board of Trustees, even if a knowledge on the part of all of them in their individual capacity, and not acting as a Board, would be sufficient. *Yellow Jacket S. M. Co. v. Stevenson*, 224.

CONSTITUTIONAL RESTRICTION ON COUNTIES, CITIES, AND TOWNS FROM BEING STOCKHOLDERS IN ANY BUT RAILROAD CORPORATION—see LEGISLATURE, 12.

COSTS.

1. **COSTS ON CONTESTED SETTLEMENT OF EXECUTOR'S ACCOUNTS.** Where, in a contest as to the settlement of the accounts of an executor, the Court below deducted a considerable sum, and then allowed the balance of the accounts: *Held*, that the contestants were entitled to their costs. *Estate of Millenovich*, 161.

CONSTRUCTION OF PRACTICE ACT, SEC. 311 AS TO COSTS—see PRACTICE ACT, 2.

COUNSEL.

ADMISSIONS OF COUNSEL IN ARGUMENT—see ATTORNEYS, 1.

COUNSEL FEES AS DAMAGES ON INJUNCTION BOND—see INJUNCTIONS, 2.

COUNTY COMMISSIONERS.

1. **DIFFERENCE BETWEEN EQUALIZING BOARD OF COUNTY COMMISSIONERS AND BOARD OF EQUALIZATION.** The Board of County Commissioners, sitting to equalize assessments for taxes made by the tax receiver under the Supplementary Revenue Act of 1867, is entirely distinct from the Board of Equalization provided for by the General Revenue Laws, though composed of the same persons. *Virginia & Truckee Railroad Co. v. Commissioners of Ormsby County*, 841.

POWERS OF COUNTY COMMISSIONERS AS TO ROADS AND BRIDGES—see ROADS AND BRIDGES, 1.

EQUALIZATION OF TAXES BY COUNTY COMMISSIONERS—see TAXES, 8, 9, 10.

COUNTY FUNDS.

1. **DISTINCTNESS OF COUNTY FUNDS—ISSUANCE OF COUNTY WARRANTS.** The mere fact that a creditor, having a right of payment out of the "General Fund" of a county, may have a right to enjoin the County Auditor from issuing warrants in favor of others against such fund, does not give him a right to restrain the Auditor from issuing warrants against other funds. *Webster v. Fish*, 190.
2. **CONSTRUCTION OF STATUTES—"GENERAL FUND" OF COUNTY.** Under the Act of 1865, relating to the apportionment of county revenues, (Stats. 1864-5, 376) the cost of the construction and repair of public roads and bridges may properly be considered such county expenditures as may be met by moneys in the "General Fund" of the County. *Webster v. Fish*, 190.

COURTS AND JUDGES.

CONSTITUTIONAL JURISDICTION OF MUNICIPAL COURTS—see CONSTITUTION, 11.

REMOVAL OF JUDGES FROM OFFICE—see CONSTITUTION, 15.

POLICY AND EXPEDIENCY OF STATUTES NOT A QUESTION FOR COURTS—see CONSTRUCTION, 8.

JUDICIARY TO DETERMINE CONSTITUTIONALITY OF STATUTES—see CONSTRUCTION, 11.

JUDICIAL NOTICE OF LAWS OF THE UNITED STATES—see EVIDENCE, 5.

INSANITY OF DISTRICT JUDGE DOES NOT VACATE OFFICE—see INSANE PERSONS, 1.

ACTS OF DE FACTO COMMITTING MAGISTRATE—see OFFICES AND OFFICERS, 6, 7.

POWERS OF COMMITTING MAGISTRATES JUDICIAL—see RECORDER OF CITY, 1, 2.

PROVINCE OF JUDGE AND JURY—REDUCTION OF VERDICT BY JUDGE—see VERDICT, 1.

CRIMINAL LAW.

1. **INDICTMENT FOR ROBBERY—OWNERSHIP OF PROPERTY.** Robbery may be committed by the taking of property from the person of one who has nothing but a special right in it; and where an indictment charged that the property was taken from the person of the prosecuting witness, and at the same time alleged it to be the property of another person: *Held*, a sufficient charge of a special property in the prosecuting witness. *State v. Ah Loi*, 99.
2. **ACCUSED PERSONS ENTITLED TO THE BENEFIT OF REASONABLE DOUBT, HOWEVER ARISING.** In criminal prosecutions the guilt of the accused must be proved beyond a reasonable doubt; but if such doubt be raised, it makes no difference whether it be raised by the evidence for the prosecution or by that for the defendant. *State v. McCluer*, 132.
3. **MURDER—THREATS—FAILURE TO CONNECT PROOF ADMITTED ON CONDITION.** In a trial for murder, evidence being offered to prove that a half hour before the killing the defendant had said that "a d—d puppy had been talking about his wife, and he was going to put a stop to it," was admitted against defendant's objection, on the undertaking of the District Attorney to show by further testimony that the defendant referred to the deceased; but no such further proof being made, nor any ruling excluding the evidence, and the prisoner being convicted of murder in the first degree: *Held*, that the testimony under the circumstances was improper, was calculated to prejudice defendant, and in the absence of a proper instruction, was good cause for reversal of the judgment. *State v. Walsh*, 315.
4. **CRIMINAL LAW—JUDGE NOT TO CHARGE AS TO WEIGHT OF EVIDENCE.** A charge in a criminal case that "it is the duty of the jury to candidly consider whether in the eye of sound reason these sufficient facts and circumstances detailed in the evidence, pointing beyond reasonable doubt to the existence of the acts and intent as charged in the indictment; and if you so conclude in your minds you must, as jurors upon your oath, so declare," amounts to a charge that the

facts detailed in the evidence are sufficient to establish the offense, and that the evidence points to the existence of the acts and intent beyond a reasonable doubt, and is error sufficient for reversal. *State v. McGinnis*, 337.

5. **CRIMINAL LAW—ISSUANCE OF FALSE LICENSE.** Where a Deputy Sheriff having brought suit against certain persons for doing business without license, upon their settlement of the suit by paying costs and amount of license, gave them a paper written by his attorney and signed by himself purporting to be a license; and it appeared that he had no proper forms or blanks at the time, and that there was no fraud or fraudulent intention on his part further than indicated by the mere naked act: *Held*, that no criminal offense was committed under the statute making the issuance of such license felony. (Stats. 1864-5, 299, Sec. 74.) *State v. Gardner*, 377.
6. **CRIMINAL INTENT NECESSARY TO CONSTITUTE CRIME.** The essence of a criminal offense is the wrongful intent, without which it cannot exist. *State v. Gardner*, 377.
7. **THE LETTER OF CRIMINAL STATUTES AS OPPOSED TO THE REASON.** While the words of a criminal statute are the primary guide to its meaning, it is well settled that to authorize a conviction under it the case presented must not only come within its words, but also within its reason and spirit, and the mischief it was intended to remedy. *State v. Gardner*, 377.

ERRORS NOT PROPERLY PRESENTED WILL NOT BE REGARDED ON APPEAL—see APPEALS, 1.

CHARGES TENDING TO MISLEAD JURY IN CRIMINAL TRIALS—see CHARGE, 2.

DECLARATION OF PARTY ROBBED AS PART OF RES GESTÆ—see EVIDENCE, 1, 2.

STATE JURISDICTION ON HABEAS CORPUS AS TO UNITED STATES PRISONERS—see HABEAS CORPUS, 8.

BURDEN OF PROOF TO REBUT PRESUMPTION OF MURDER—see MURDER, 1.

DAMAGES.

DAMAGES ON INJUNCTION BOND—see INJUNCTIONS, 2.

DEEDS.

1. **A DEED OF A WATER-RIGHT DOES NOT CONVEY A MILL SITE.** A deed conveying all the water of a river between certain points "for the purposes and use of machinery or ditches, or for any other uses," does not convey the land of a mill site on the river. *Robinson v. Imperial Silver Mining Company*, 44.

DEFINITIONS.

1. **DEFINITION OF WORD "ELECTED."** The word "elected" in its ordinary signification carries with it the idea of a vote, generally popular but sometimes more restricted, and cannot be held the synonym of any other mode of filling a position. *Clarke v. Irwin*, 111.
- AMNESTY, WHAT**—see AMNESTY, 1.
- PUBLIC DEBT OF STATE**—see CONSTITUTION, 2.
- FIXED COMPENSATION OF LEGISLATORS**—see CONSTITUTION, 3.
- CONSTITUTIONAL "CLAIM AGAINST THE STATE"**—see CONSTITUTION, 5.
- MEANING OF "APPLICABILITY OF GENERAL LAWS" IN CONSTITUTION**—see CONSTITUTION, 7.
- MEANING OF "VACANT" IN CONSTITUTION**—see CONSTITUTION, 9.
- "MUNICIPAL PURPOSES," WHAT**—see CONSTITUTION, 11.
- MEANING OF "LOANING CREDIT"**—see CONSTITUTION, 12.
- MEANING OF "DUE PROCESS OF LAW"**—see CONSTITUTION, 13.
- MEANING OF "FOR ASSESSMENT AND COLLECTION OF TAXES," &c.**—see CONSTITUTION, 14.
- MEANING OF "ELECTION" AND "ELECTION BY THE PEOPLE" IN CONSTITUTION**—see ELECTIONS, 1.
- INTEREST, WHAT**—see INTEREST, 2.
- ACTUAL POSSESSION OF LAND, WHAT**—see POSSESSION, 1.
- "WRITTEN DECISION" AND "WRITTEN OPINION"**—see PRACTICE ACT, 3.
- "LOCAL" AND "SPECIAL" STATUTES**—see STATUTES, 1.
- TELEGRAPHIC COMMUNICATION BETWEEN STATES, "COMMERCE"**—see TELEGRAPH, 1.

ELECTIONS.

1. **MEANING OF "ELECTION" AND "ELECTION BY THE PEOPLE," IN CONSTITUTION.** The words "election," in section twenty-six, and "election by the people," in section thirty-two, of article four of the Constitution, contemplate the same mode of election and imply a popular vote. *Clarke v. Irwin*, 111.
- WHITE PINE COUNTY ACT DOES NOT "REGULATE ELECTIONS"**—see CONSTITUTION, 6.
- REGISTRY LAW**—see REGISTRY LAW.

ELKO COUNTY.

- ELKO COUNTY REGISTRATION**—see MANDAMUS, 3.

EMINENT DOMAIN.

RAILROAD USES PUBLIC USES—see RAILROADS, 1, 2.

RAILROAD CONDEMNATION OF LAND—see RAILROADS, 4, 6.

VALUATION OF LAND TAKEN FOR RAILROADS—see RAILROADS, 7, 8.

EQUITY.

DOCTRINES OF RESULTING TRUSTS—see TRUSTS, 1, 2, 3, 4.

ERRORS.

ERRORS NOT PROPERLY PRESENTED WILL NOT BE REGARDED—see APPEALS, 1.

ERRORS NOT PREJUDICIAL—see APPEALS, 2, 3.

ASSIGNMENT OF ERRORS IN STATEMENT ON APPEAL—see APPEALS, 5.

JUDGMENTS NOT DISTURBED ON MEAGER GROUNDS—see APPEALS, 7, 8.

PREJUDICIAL ERROR ONLY AVAILABLE ON APPEAL—see APPEALS, 9.

ERRORS OF TRANSCRIPTION IN RECORD OF APPEAL—see APPEALS, 16.

ERROR IN REFUSING A CORRECT AND PERTINENT INSTRUCTION—see APPEALS, 19.

NO ERROR TO REFUSE INAPPLICABLE INSTRUCTION—see CHARGE, 1.

AMBIGUITY IN CHARGE IN CRIMINAL CASES—see CHARGE, 2.

EVIDENCE ADMITTED WITHOUT OBJECTION NOT ERROR—see EVIDENCE, 8.

SPECIFICATIONS OF ERROR AS TO ENTIRE CHARGE OF JUDGE—see NEW TRIAL, 1.

SPECIFICATIONS OF ERRORS IN STATEMENTS FOR NEW TRIAL—see NEW TRIAL, 2, 3, 5, 6.

WAIVER OF ERRORS TO BE SHOWN BY PARTY CLAIMING WAIVER—see WAIVER, 1.

EVIDENCE.

1. **DECLARATIONS OF PERSON ROBBED AS PART OF RES GESTÆ.** On a trial for robbery the declarations of the person robbed as to the fact of the robbery, made immediately after the crime was committed, are admissible in evidence as part of the *res gestæ*. *State v. Ah Loi*, 99.
2. **CONTEMPORANEOUSNESS OF DECLARATIONS AS PART OF RES GESTÆ.** To make the declarations of a party injured part of the *res gestæ*, they must be contemporaneous with the crime; but in order to be contemporaneous within the meaning of the law it is not indispensable that they should be precisely concurrent in point of time: if they spring out of and elucidate the transaction, and are voluntary and spontaneous, and made so near the time as reasonably to pre-

clude the idea of deliberate design, they may be regarded as contemporaneous. *State v. Ah Loi*, 99.

3. **EVIDENCE—LETTER OF U. S. POSTMASTER-GENERAL.** Though a letter of the U. S. Postmaster-General, to the effect that the acceptance by a telegraph company of the terms and conditions of the Act of Congress relating to telegraph line, (14 U. S. Stats. at Large, 221) had been received and placed on file, might be proof of such acceptance, it cannot be so without authentication of the signature. *Western Union Telegraph Company v. Atlantic & P. S. Telegraph Company*, 102.
4. **PROOF REQUIRED TO SUSTAIN DEFENSE IN MURDER CASES.** Where a voluntary homicide is proved by the State, and its testimony shows no circumstances of mitigation, excuse, or justification, the burden of establishing such mitigation, excuse, or justification, devolves upon the defendant; but he is not required to establish the facts constituting his defense either by proof beyond a reasonable doubt, or by proof preponderating over or outweighing that on the part of the prosecution. *State v. McCluer*, 132.
5. **JUDICIAL NOTICE OF LAWS OF THE UNITED STATES.** State Courts take judicial cognizance of the laws of the United States without formal proof of them, and are bound thereby. *Ex parte Hill*, 154.
6. **SECONDARY EVIDENCE OF LOST JUDICIAL RECORDS.** Where an order of the Probate Court, necessary as an authorization to justify the acts of an executor, is lost, secondary evidence of its character is allowable. *Estate of Millenovich*, 161.
7. **ENTRIES IN ACCOUNT BOOKS.** Where, in a suit on an account, the entries in plaintiff's books were received in evidence without objection, and the Court charged that, having been thus received, they were proof, if uncontradicted, to show the transactions and prices therein entered: *Held*, that though such entries might not have been admissible if objected to at the time, yet under the circumstances, the charge was correct. *Sherwood v. Sissa*, 349.
8. **EVIDENCE ADMITTED WITHOUT OBJECTION.** If evidence, secondary or hearsay in its character, be admitted without objection, no advantage can be taken of that fact afterward, and the jury may and should accept it as if it were admissible under the strictest rules of evidence. *Sherwood v. Sissa*, 349.

OBJECTIONS FOR DEFECT OF EVIDENCE NOT MADE IN COURT BELOW—see APPEALS, 4.

OBJECTION THAT FINDINGS ARE CONTRARY TO EVIDENCE—see APPEALS, 8.

IMPROPER EVIDENCE THAT DOES NOT PREJUDICE—see APPEALS, 9.

APPEAL ON CONFLICT OF EVIDENCE—see APPEALS, 15.

STATEMENT NOT CONTAINING ALL THE EVIDENCE—see APPEALS, 17.

WHEN A VERDICT WILL BE REVERSED AS AGAINST EVIDENCE—see APPEALS, 21.

- FAILURE TO CONNECT PROOF ADMITTED ON CONDITION—see CRIMINAL LAW, 3.
- JUDGE NOT TO CHARGE AS TO WEIGHT OF EVIDENCE—see CRIMINAL LAW, 4.
- INSURANCE CONTRACTS—BURDEN OF PROOF—see INSURANCE, 2.
- BURDEN OF PROOF ON NEW PROMISE UNDER STATUTE OF LIMITATION—see LIMITATIONS, 8.
- SPECIFICATION OF INSUFFICIENCY OF EVIDENCE IN STATEMENTS—see NEW TRIAL, 2, 4.
- DIFFERENCE AS TO WEIGHT OF EVIDENCE ON NEW TRIAL AND ON APPEAL—see NEW TRIAL, 7.
- PLEADING AND PROOF OF OWNERSHIP OF PROMISSORY NOTES—see PROMISSORY NOTES, 3, 4.
- CERTIFICATE OF JUDGE AS TO EVIDENCE IN STATEMENT—see STATEMENTS, 2.
- DEMAND FOR SWORN STATEMENT—BURDEN OF PROOF—see SWORN STATEMENTS, 1.
- PROOF OF ACCEPTANCE UNDER CONGRESSIONAL TELEGRAPH ACT—see TELEGRAPH, 3.
- EVIDENCE TO SHOW RESULTING TRUST—see TRUSTS, 4.
- EXECUTORS COMPETENT WITNESSES ON THEIR OWN BEHALF—see WITNESS, 1.

EXAMINERS.

(See BOARD OF EXAMINERS.)

EXCEPTIONS.

- OBJECTIONS FOR DEFECT OF EVIDENCE NOT MADE IN COURT BELOW—see APPEALS, 4.
- OBJECTIONS NOT TAKEN BELOW NOT AVAILABLE IN APPELLATE COURT—see APPEALS, 20.
- EVIDENCE ADMITTED WITHOUT OBJECTION NOT ERROR—see EVIDENCE, 8.
- EXCEPTIONS, HOW PRESERVED IN STATEMENT—see STATEMENTS, 1.

EXECUTORS AND ADMINISTRATORS.

1. ACCOUNTABILITY OF EXECUTORS AND ADMINISTRATORS. While the law closely scrutinizes the acts of executors and administrators, and requires the utmost good faith from them in all their transactions with or on behalf of the estate, it does not require infallibility of judgment nor rigorous accountability for any mishap which may occur during the administration. *Estate of Millenovich*, 161.

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2. **LIABILITY OF EXECUTORS FOR LOSSES.** If an executor, in the conscientious and judicious discharge of his duty, sustains a loss by reason of unfortunate circumstances, and not by reason of any violation of a positive requirement of law, he should not be held to strict personal account for such loss. *Estate of Millenovich*, 161.
 3. **CHARGES FOR REPAIRS MADE BY EXECUTORS.** If an executor be authorized to make repairs to the property of his testator's estate, and in so doing expend somewhat more than the real value of the improvements, yet if it appear that he acted in good faith, and exercised ordinary discretion and circumspection in the matter, an order of the Court below allowing the charge will not be disturbed on appeal. *Estate of Millenovich*, 161.
 4. **LEASES BY EXECUTORS.** If an executor lease property belonging to the estate represented by him, it does not follow that he should lease to those who offer to pay the highest rent; the purposes for which the property is to be used, the responsibility of the lessee, the length of time for which he may agree to lease, and many other circumstances of the kind, must be taken into consideration. *Estate of Millenovich*, 161.
 5. **FUNERAL EXPENSES.** In the settlement of executors' accounts for funeral expenses, all the circumstances of the case should be taken into consideration, and their accounts allowed, if they have acted with ordinary prudence and with a regard for decency and respectability, according to the condition in life of the deceased. *Estate of Millenovich*, 161.
 6. **EXPENSES OF LAST SICKNESS.** If the charges allowed and paid by an executor for the expenses of the last sickness of his testator, though apparently extravagant, are no more than the usual charges for like services at the time, an order approving his account of them will not be disturbed on appeal. *Estate of Millenovich*, 161.
 7. **EXECUTORS INTERESTED IN PURCHASES FROM ESTATE.** Though the statute prohibits executors from being interested in the purchase of the property of the estate, yet if such a purchase be made, the Court may affirm it, the only consideration in such case being the interest of the estate. *Estate of Millenovich*, 161.
 8. **DESPERATE CLAIMS DUE ESTATES OF DECEASED PERSONS.** An executor or administrator should make all reasonable effort to collect all claims due the estate, but he should not involve it in litigation for claims which in his judgment cannot be collected; and if such claims have no value attached to them in the inventory, it will require clear proof of loss through his carelessness or want of attention to charge him with the amount of them. *Estate of Millenovich*, 161.
 9. **MINING STOCKS OF DECEASED PERSONS.** Mining stocks belonging to the estate of a deceased person, which are only an expense to it, should be disposed of, unless it be quite evident that it would be for the interest of the estate to hold them. *Estate of Millenovich*, 161.

10. **EXPENSES OF CONTESTS BETWEEN EXECUTORS.** The expenses incurred in a controversy between executors, one opposing the qualification of the others, are not just or proper charges against the estate. *Estate of Millenovich*, 161.
11. **INTEREST ON MONEY BORROWED BY EXECUTORS NOT ALLOWED.** An executor or administrator has no authority to borrow money for the use of the estate represented by him, nor will interest on money borrowed for the estate be allowed. *Estate of Millenovich, No. 2*, 189.

POSITIVE LAW MUST BE STRICTLY FOLLOWED BY EXECUTORS—see PROBATE, 1.

ACTS OF EXECUTORS IN GOOD FAITH WITHOUT ORDER OF COURT—see PROBATE, 2.

SETTLEMENT OF ACCOUNTS OF EXECUTORS—IRREGULARITIES IN PROCEEDINGS—see PROBATE, 8.

PURCHASE BY EXECUTOR AFTER ESTATE CEASES TO HAVE INTEREST—see PROBATE, 5.

EXECUTORS COMPETENT WITNESSES ON THEIR OWN BEHALF—see WITNESS, 1.

FILING.

FILING OF SURVEY IN RECORDER'S OFFICE—see CONSTRUCTION, 9.

INDORSEMENT OF FILING—see RECORDER, 1.

FINDINGS.

1. **FINDINGS NOT "WRITTEN OPINION."** The Practice Act, section three hundred and forty, when it speaks of "any written opinion placed on file in rendering judgment," does not refer to findings. *Corbett v. Job*, 201.
2. **TRIAL BY COURT—FINDINGS EQUIVALENT TO VERDICT.** Where a cause is tried by a Court without a jury the same weight and consideration is given to its findings as to a verdict; and the same rules apply as to reversing them on appeal on the ground of being contrary to evidence, as to a verdict of a jury. *State v. Yellow Jacket Company*, 415.

OBJECTIONS THAT FINDINGS ARE CONTRARY TO EVIDENCE—see APPEALS, 8.

NO APPEAL ON FINDINGS EXCEPT BY STATEMENT—see APPEALS, 10.

FORFEITURE.

FORFEITURE OF RIGHTS AND LIEN UNDER CONTRACT BY NONCOMPLIANCE—see LIENS, 3.

FUNDS.

FUND ACT, LEGISLATIVE—see LEGISLATURE.

FUNDS OF COUNTY—see COUNTY FUNDS.

GOVERNOR.

APPOINTMENT TO OFFICE BY GOVERNOR—see OFFICES AND OFFICERS, 2.

POWER OF GOVERNOR TO APPOINT TO VACANCY—see VACANCY, 1, 3.

HABEAS CORPUS.

1. HABEAS CORPUS—RIGHT TO ISSUE WRIT. A State Court or Judge, duly authorized by the laws of the State, may issue the writ of habeas corpus in any case where a party is imprisoned within its territorial limits, provided it does not appear when the application is made that the person imprisoned is in custody under the authority of the United States. *Ex parte Hill*, 154.
2. DUTY OF OFFICER TO MAKE RETURN TO WRIT. It is the duty of any person having the custody of a prisoner to make known by a proper return to a Court or Judge issuing a writ of habeas corpus to him, the authority by which he holds such person in custody; and this duty applies to a United States Marshal in response to a writ from a State Court or Judge. *Ex parte Hill*, 154.
3. STATE JURISDICTION ON HABEAS CORPUS AS TO OFFENSES AGAINST THE UNITED STATES. A State Court or Judge cannot on habeas corpus examine or decide whether a particular offense charged in an indictment, found in a United States Court, is or is not an offense against the laws of the United States. *Ex parte Hill*, 154.

HOMESTEAD.

1. NO HOMESTEAD AS AGAINST LIEN FOR PURCHASE MONEY. There can be no homestead right acquired in property as against the purchase money, unless the lien therefor, whether created by mortgage or existing by way of vendor's lien, has been relieved in some lawful way. *Hopper v. Parkinson*, 233.
2. FORECLOSURE OF MORTGAGE FOR PURCHASE MONEY. In a foreclosure suit on a mortgage given by a husband to secure the purchase money of land, and made contemporaneously with the deed of the land to him, the wife, being admitted to defend, set up a homestead right: *Held*, that neither husband nor wife could acquire any homestead right as against the mortgage debt. *Hopper v. Parkinson*, 233.

INDICTMENT.

INDICTMENT FOR ROBBERY—OWNERSHIP OF PROPERTY—see CRIMINAL LAW, 1.

INJUNCTION.

1. **INJUNCTION TOO LATE TO RESTRAIN ACT ALREADY DONE.** Warrants already issued by a County Auditor are beyond the reach of an injunction suit brought to restrain him from issuing such warrants. *Webster v. Fish*, 190.
2. **DAMAGES ON INJUNCTION BONDS.** The actual expense and loss occasioned by a writ of injunction are a proper subject of consideration in a suit on the injunction bond, including the costs of the original proceeding, the reasonable counsel fee paid, agreed to be paid or liquidated, for setting aside the injunction, and such other damage as is the natural and proximate consequence of the issuance and enforcement of the writ, and no more; nothing, generally, can be included which is not the actual, natural, and proximate result of the injunction. *Brown v. Jones*, 874.

INJUNCTION TO RESTRAIN ISSUANCE OF COUNTY WARRANTS—see **COUNTY FUNDS**, 1.

MODIFICATION OF INJUNCTION AS TO REMOVAL OF WOOD CUT ON PUBLIC LAND—see **LANDS**, 5.

INSANE PERSONS.

1. **STATUTE CONCERNING INSANE PERSONS—VACANCY IN OFFICE.** The finding and declaration of an incumbent of the office of District Judge to be insane, in accordance with the provisions of the statute for the care of the insane (Stats. 1869, 104) does not create a vacancy in his office. *O'Neale v. McClinton*, 329.

INSTRUCTIONS.

(See **CHARGE**.)

INSURANCE.

1. **INSURANCE—NOTICE OF OTHER INSURANCE.** Where a policy of insurance contained a provision for "notice of any other insurance already made or which shall afterwards be made elsewhere," otherwise the policy to be void; and the property was afterwards insured in another company without proper notice: *Held*, that the policy was vitiated. *Healey v. Imperial Fire Ins. Co.*, 268.
2. **INSURANCE CONTRACTS—BURDEN OF PROOF.** A policy of insurance is a contract which must be enforced according to its terms; and the burden of proof is upon the claimant thereunder to show a compliance therewith. *Healey v. Imperial Fire Ins. Co.*, 268.

3. **NOTICE OF INTENTION TO INSURE NOT NOTICE OF INSURANCE.** Where an insurance policy provided for notice of any other insurance which should afterwards be made: *Held*, that notice of intention to further insure was not notice of further insurance, nor equivalent thereto. *Healey v. Imperial Fire Ins. Co.*, 268.
4. **INSURANCE AGENT—EXTENT OF AUTHORITY.** An insurance agent having authority to receive application, make survey, remit to general agent, receive policy, and collect premium, though the agent of the insurer for all purposes touching the insurance up to the time of closing the application, has no power after the policy arrives in his hands to waive any of its conditions; all his functions as agent have then ceased, except to receive the premium. *Healey v. Imperial Fire Ins. Co.*, 268.
5. **CONSTRUCTION OF INSURANCE POLICIES.** In the construction of policies of insurance there is but one safe rule, and that is, to take the contract as written, subtracting nothing therefrom and adding nothing thereto: there is no substantial compliance with its terms, except an exact compliance. *Healey v. Imperial Fire Ins. Co.*, 268.
6. **NOTICE OF INTENTION TO RENEW INSURANCE NOT NOTICE OF RENEWAL.** If an insurance policy require "notice of any other insurance already made, or which shall afterwards be made elsewhere," a notice of an existing insurance and of an intention to renew it, is not notice of the fact of renewal, nor a compliance with the policy. *Healey v. Imperial Fire Ins. Co.*, 268.

PLEADINGS ON INSURANCE POLICY—see PLEADING, 2.

INTENT.

CRIMINAL INTENT NECESSARY TO CONSTITUTE CRIME—see CRIMINAL LAW, 6.

INTEREST.

1. **INTEREST ON CONTROLLERS' WARRANTS.** If, as is now decided, warrants issued under the Legislative Fund Act of 1869, create no debt against the State within the meaning of the constitutional restriction, (Const., Art. IX, Sec. 8) the addition of an interest clause to such warrants cannot make them unconstitutional. *Ash v. Parkinson*, 15.
2. **INTEREST, WHAT.** Interest constitutes no part of the original demand; it is simply a statutory allowance for delay. *Ash v. Parkinson*, 15.

INTEREST ON MONEY BORROWED BY EXECUTORS NOT ALLOWED—see EXECUTORS, &c., 11.

TAXATION FOR INTEREST OF UNISSUED COUNTY BONDS—see TAXES, 5.

INTEREST ON INDEBTEDNESS OF VIRGINIA CITY—see VIRGINIA CITY, 2.

JOINT DEBTORS.

1. **JOINT DEBTOR DEFENDANT DECLARED A BANKRUPT—CONTINUANCE.** Where, in a suit against partners on a joint claim against them, it appeared that one had been declared a bankrupt, but had not yet received his discharge, and the case was continued as to him: *Held*, on a motion for a continuance as to the other partner, that the trial could not proceed against him until a disposition of the bankrupt proceedings of his copartner. *Tinkum v. O'Neale*, 93.
2. **PRACTICE ACT, SECTION THIRTY-TWO—JUDGMENT AGAINST JOINT DEBTORS.** Where the defendants in an action against two are both served with the summons, a judgment, under section thirty-two of the Practice Act, cannot be entered against one to be executed against his separate property and the joint property of both. *Mayenbaum v. Murphy*, 383.

PARTNERSHIP CONTRACTS JOINT—see PARTNERSHIP, 1.

JUDGMENT.

1. **JUDGMENT VOID FOR WANT OF JURISDICTION.** A judgment by a Justice of the Peace against a non-resident, where the affidavit or order of publication is insufficient and there is no personal service nor any appearance, is absolutely void. *Little v. Currie*, 90.

NO REVERSAL FOR ERROR WHERE JUDGMENT CLEARLY RIGHT—see APPEALS, 3.

JUDGMENTS NOT DISTURBED ON MEAGER GROUNDS—see APPEALS, 7.

APPEAL FROM JUDGMENT WHERE EVIDENCE CONFLICTING—see APPEALS, 15.

NO JUDGMENT UNDER SECTION 32 OF PRACTICE ACT, WHERE JOINT DEBTORS BOTH SERVED—see JOINT DEBTORS, 2.

JUDGMENT AGAINST ONE PARTNER BARS ACTION AGAINST COPARTNER—see PARTNERSHIP, 2.

JURISDICTION.

1. **STATE COURTS NOT TO INTERFERE WITH JURISDICTION OF UNITED STATES COURTS.** In every case where process regular upon its face has been issued from a United States Court having power to issue process of such a nature, the officer while acting thereunder is fully protected against any interference from a State Court; and such State Court, when judicially informed of the existence of the process, cannot go behind the same to make any further inquiry. *Ex parte Hill*, 154.
2. **PRESUMPTIONS IN FAVOR OF PROCEEDINGS OF UNITED STATES DISTRICT COURT.** A District Court of the United States has the power to find, through its grand jury, an indictment for any offense within its jurisdiction; and as to any matter

within such jurisdiction, it is not an inferior Court; and the presumptions are in favor of the regularity of its proceedings. *Ex parte Hill*, 154.

8. CONSTITUTIONAL JURISDICTION OF MUNICIPAL COURTS. Section nine, article six, of the Constitution, as to the power which may be conferred upon Municipal Courts is restricted by section one of the same article, by which the jurisdiction of such Courts cannot be extended beyond municipal purposes. *Meagher v. County of Storey*, 244.

CERTIORARI EXTENDS ONLY TO JURISDICTIONAL QUESTIONS—see CERTIORARI, 1.

JUDGMENT OF JUSTICE OF THE PEACE VOID FOR WANT OF JURISDICTION—see JUDGMENT, 1.

NO PRESUMPTION IN FAVOR OF JURISDICTION OF JUSTICE OF THE PEACE—see JUSTICE OF THE PEACE, 1.

STATUTORY PROVISIONS FOR ACQUIRING JURISDICTION—see SERVICE, 1.

JURY.

PROVINCE OF JUDGE AND JURY—REDUCTION OF VERDICT BY JUDGE—see VERDICT, 1.

WHEN A VERDICT WILL BE REVERSED AS AGAINST EVIDENCE—see VERDICT, 2.

JUSTICE OF THE PEACE.

1. NO PRESUMPTION IN FAVOR OF JURISDICTION OF JUSTICES OF THE PEACE. Nothing can be presumed in favor of the jurisdiction of a Justice of the Peace, but each step towards its acquirement must be affirmatively shown. *Little v. Currie*, 90.

AFFIDAVIT FOR PUBLICATION OF SUMMONS—see AFFIDAVIT, 1.

JUDGMENT OF JUSTICE WITHOUT JURISDICTION ABSOLUTELY VOID—see JUDGMENT, 1.

LANDLORD AND TENANT.

1. ENTRY UNDER VOID LEASE—TENANCY AT WILL. The rule that a tenancy at will is created where a tenant enters upon property under a void lease, and as such tenant at will is entitled to notice to quit, does not apply to a case of entry under a lease made by a pretended agent acting entirely without authority from the owners. *Yellow Jacket S. M. Company v. Stevenson*, 224.

UNAUTHORIZED LEASE BY PRESIDENT OF MINING COMPANY—see CORPORATIONS, 3.

LEASES BY EXECUTORS—see EXECUTORS, &c., 4.

LANDS.

1. **LOCATION AND POSSESSION OF LAND FOR MILL SITE AND WATER RIGHT.** Black & Eastman, in December, 1859, posted a notice on a tree on the bank of Carson River, of the location by them of a water right commencing at that point, and of a right of way for a ditch of a certain capacity to a rocky bend of the river below, and within the next six months did some fifteen or twenty days' work on the ditch but not sufficient to make it of any practical use; and they also erected a monument of stones at a point suitable for a mill site, on the river below the rocky bend; after which nothing further was done until October, 1860, when DeGroot entered: *Held*, not sufficient acts on the part of Black & Eastman to give them actual possession of the land traversed by the ditch, or of the mill site, nor to prevent DeGroot's entry and appropriation of them. *Robinson v. Imperial Silver Mining Company*, 44.
2. **DIFFERENCE BETWEEN APPROPRIATIONS OF LAND AND WATER.** Public land is appropriated by one character of act, water by another. The digging of a ditch, on public land is not an appropriation of land sufficient for a mill site, nor is the mere appropriation of a mill site an appropriation of water for milling purposes. *Robinson v. Imperial Silver Mining Company*, 44.
3. **TOWN SITE APPROPRIATIONS.** A private survey for a town site was made of a tract of land, including certain premises claimed by other parties, and not as a part of the town site, which premises were not subdivided into lots like the balance of the tract, nor plotted on the map thereof, nor were they fenced or improved: *Held*, that the owners of the town site, though they might possess and own the lots subdivided, staked out and plotted by them without fencing or other improvement, they could not be held to have appropriated the premises not so subdivided, and had no possession of them. *Robinson v. Imperial Silver Mining Company*, 44.
4. **FORCIBLE INTERRUPTION OF SETTLEMENT ON PUBLIC LAND.** DeGroot, having entered upon certain public land under the Utah Statute of 1852 (Utah Stats. 1852, 175) and caused it to be surveyed, was engaged in fencing it, when he was forcibly driven off: *Held*, that by a compliance with the law so far as he could or was permitted, he acquired a title which entitled him to the possession of the land as against all persons except the government. *Robinson v. Imperial Silver Mining Company*, 44.
5. **REMOVAL OF WOOD CUT ON PUBLIC LAND BEFORE PATENT.** Where Peck, being the patentee of certain public land, procured an injunction to restrain Brown and others from cutting growing trees, and also from removing certain cordwood and other timber cut before the issuance of the patent and still remaining on the land: *Held*, that the injunction should be so modified as to allow the cordwood and cut timber to be removed. *Peck v. Brown*, 81.
6. **WATER RIGHTS—NO RIPARIAN PROPRIETORSHIP ON PUBLIC LAND.** In a suit to enjoin the diversion of water from a river, which was first appropriated by the

plaintiffs, it was stipulated that "the only title to the lands of plaintiffs and defendants is a possessory one, the fee being in the General Government: *Held*, that this agreement rebutted the proposition of a defendant that he was a riparian proprietor, or could claim the water as such. *Covington v. Becker*, 281.

RAILROAD CONDEMNATION OF LAND—QUANTITY—see RAILROADS, 4.

RAILROAD DEPOTS—HOW MUCH LAND NECESSARY—see RAILROADS, 6.

VALUATION OF LAND TAKEN BY RAILROADS—see RAILROADS, 7, 8.

RESULTING TRUSTS IN LANDS—see TRUSTS, 1, 2, 3, 4.

LEASES.

(See LANDLORD AND TENANT.)

LEGISLATURE.

1. **LEGISLATIVE FUND ACT CONSTITUTIONAL.** The Act of 1869, to create a legislative fund (Stats. 1869, 54) is not unconstitutional. *Ash v. Parkinson*, 15.
2. **EXPENDITURE NECESSARY TO CARRY ON LEGISLATIVE ACTION.** As the Constitution provides for a Legislature and recognizes incidentally the necessary officers and ordinary adjuncts of such a body, it also impliedly authorizes such expenditures as are necessary to carry it on. *Ash v. Parkinson*, 15.
3. **LEGISLATIVE POWER TO APPROPRIATE MONEY.** The Legislature has power to appropriate money as it sees fit except when limited by the Constitution. *Ash v. Parkinson*, 15.
4. **INCIDENTAL EXPENSES OF LEGISLATURE TO ACCRUE.** Incidental expenses of the Legislature to accrue cannot be held to constitute "claims against the State," nor do they require action by the Board of Examiners as such. *Ash v. Parkinson*, 15.
5. **INCIDENTAL EXPENSES OF LEGISLATURE ALREADY ACCRUED.** There is a reasonable doubt as to whether the incidental expenses of the Legislature already accrued, constitutionally require examination by the Board of Examiners; and on the question of the constitutionality of a statute providing for the payment of such expenses without such examination, it cannot on the ground of not providing for such examination be pronounced unconstitutional. *Ash v. Parkinson*, 15.
6. **POWER OF LEGISLATURE TO FILL NEW OFFICES.** The White Pine County Act (Stats. 1869, 108) created the new office of Sheriff of White Pine County, and appointed Irwin to the office: *Held*, that if there was no vacancy, the Legisla-

ture had the power to appoint; if there was a vacancy, the act creating the office and occasioning the vacancy filled it. *Clarke v. Irwin*, 111.

7. **LEGISLATIVE POWER TO DECLARE WHAT SHALL OPERATE "VACANCY."** Though the Constitution provides in some instances what shall operate a vacancy in office, such as absence of judicial officers, etc., this does not prohibit the Legislature from enumerating other causes. *Clarke v. Irwin*, 111.
8. **POSSIBLE ABUSE OF LEGISLATIVE POWER.** The possible abuse of legislative power is no argument against either its existence or appropriate exercise. *Clarke v. Irwin*, 111.
9. **POPULAR GOVERNMENT.** The maxim that all political power originates with the people lies at the foundation of our political system; but after the organization of government it is only through their representatives that the people can exercise it. *Gibson v. Mason*, 283.
10. **LEGISLATIVE POWER OF STATE LEGISLATURE.** The State Legislature possesses legislative power unlimited except by the Federal Constitution, and such restrictions as are expressly placed upon it by the State Constitution; it is within the sphere of legislation the exponent of the popular will, endowed with all the power in this respect which the people themselves possessed at the time of the adoption of the Constitution. *Gibson v. Mason*, 283.
11. **THE LEGISLATURE THE JUDGE OF EXPEDIENCY.** The power to make the law must necessarily carry with it the right to judge of its expediency and justice. *Gibson v. Mason*, 283.
12. **LEGISLATIVE POWER AS TO AIDING RAILROADS.** Section ten of article eight of the Constitution, which prohibits counties, cities, and towns from becoming stockholders in corporations, or loaning their credit in aid of any corporations, except railroad companies, though it does not confer any right upon such organizations, does not prevent the Legislature from authorizing a county to aid a railroad, either by loaning its credit, donation, or otherwise. *Gibson v. Mason*, 283.
13. **LEGISLATIVE POWER OF TAXATION UNLIMITED.** So far as the extent of taxation is concerned, or the purposes for which taxes may be levied, provided such purposes are public in their nature, there is no limit or restriction placed upon the legislative power. *Gibson v. Mason*, 283.
14. **EXAMINING POWERS ONLY ADVISORY TO THE LEGISLATURE.** The examining powers of the Board of Examiners and of the Controller are, with reference to the Legislature, only advisory. *Lewis v. Doron*, 399.

APPROPRIATIONS IN ANTICIPATION OF RECEIPT OF PUBLIC REVENUE—see APPROPRIATION, 1.

REMOVAL OF JUDGES FROM OFFICE BY LEGISLATURE—see CONSTITUTION, 15.

POWER TO APPOINT RAILROAD COMMISSIONERS—see CONSTITUTION, 16.

POLICY AND EXPEDIENCY OF STATUTES—see CONSTITUTION, 8.

LICENSES.

1. **STATUTE AGAINST ISSUANCE OF FALSE LICENSES.** The Legislature, in passing the statute against the issuance of licenses other than those properly issued to the Sheriff, (Stats. 1864-5, 299) did not intend such fearful consequences as a conviction for felony, and imprisonment in the State prison, upon the violation merely of the letter of the statute; and in a prosecution under it, a charge to the jury which entirely ignores any question of criminal intent is error. *State v. Gardner*, 377.

LIENS.

1. **STATUTORY LIEN FOR KEEPING ANIMALS LOST BY SURRENDER OF POSSESSION.** Where a stable-keeper boarded a team of horses, but allowed them every day to be driven away to work, and on one occasion after being so driven away they were not returned: *Held*, that though he might under the statute (Statutes of 1866, 65) have retained possession of the horses, and insisted upon his lien, yet, having allowed them to be driven away, he relinquished possession and thereby lost his right of lien. *Cardinal v. Edwards*, 36.
2. **FIXING FUTURE TIME OF PAYMENT DESTROYS LIEN.** The fixing of a future time of payment for the keeping or boarding of animals, such as an agreement to pay on the first of each month, destroys the lien contemplated by the Statute of 1866. (Statutes of 1866, 65.) *Cardinal v. Edwards*, 36.
3. **FORFEITURE OF RIGHTS AND LIEN UNDER CONTRACT BY NONCOMPLIANCE.** Where a person contracted to cut down the timber of another, and deliver the same by a certain time at a certain place, for a certain price to be then paid, and was to have a lien upon the wood for the stipulated payments, and he failed to deliver by the time specified: *Held*, that though paid as he cut the wood all his labor was worth, he had forfeited all right under the contract, and had no right of lien. *Hilger v. Edwards*, 85.

NO HOMESTEAD AS AGAINST LIEN FOR PURCHASE MONEY—see HOMESTEAD, 1, 2.

MORTGAGE TO SECURE PURCHASE MONEY NOT A VENDOR'S LIEN—see MORTGAGE, 1.

LIMITATIONS.

1. **CONSTRUCTION OF STATUTE OF LIMITATIONS.** Section twenty-one of the Statute of Limitations, (Stats. 1861) in the use of the expression "cause of action," includes real action or actions as to real estate as well as personal action. *Robinson v. Imperial Silver Mining Company*, 44.

2. **STATUTES OF LIMITATION GENERALLY AFFECT THE REMEDY AND NOT THE RIGHT.** Statutes of Limitation apply only to the remedy on a contract, and not to the right or obligation; so that, though the statutory bar has fully run against a contract where made, yet, if it is to be performed at another place, and it is not there barred, it may be enforced, provided the statute has not absolutely, by its terms, extinguished and nullified the claim itself. *Wilcox v. Williams*, 206.
3. **EFFECT OF NEW STATUTES OF LIMITATION.** The Statute of Limitations in force at the time of suit brought governs the remedy on a contract: *provided*, in case of the passage of a new statute after the making of the contract, a reasonable time be given to bring suit. *Wilcox v. Williams*, 206.
4. **CONSTRUCTION OF NEW STATUTE OF LIMITATIONS.** The Statute of Limitations of 1862, (Stats. 1862, 82) which provided that suit should be brought on a contract made without the State within six months after the cause of action accrued, was amended in 1867 (Stats. 1867, 85) so as to extend the period of limitation on such contracts to two years: *Held*, that after the passage of the latter Act suit might be brought on any contract made out of the State, the cause of action on which had accrued within two years, though it might have been barred under the former statute. *Wilcox v. Williams*, 206.
5. **STATUTE OF LIMITATIONS—NEW PROMISES.** The Statute of Limitations (Stats. 1861, 81) excludes an acknowledgment or promise not in writing as evidence of a new or continuing contract to take a case out of the operation of the statute. *Wilcox v. Williams*, 206.
6. **STATUTE OF LIMITATIONS—PART PAYMENT.** Part payment is not sufficient as a new promise to take a case out of the operation of the Statute of Limitations. *Wilcox v. Williams*, 206.
7. **STATUTE OF LIMITATIONS—ACKNOWLEDGMENTS MUST BE DISTINCT.** An acknowledgment, to take a case out of the operation of the Statute of Limitations, must be clear, explicit, and direct to the point that the debt is due. *Wilcox v. Williams*, 206.
8. **STATUTE OF LIMITATIONS—BURDEN OF PROOF ON NEW PROMISE.** If a plaintiff, relying upon an acknowledgment in writing to take a case out of the operation of the Statute of Limitations, proves a general acknowledgment of indebtedness, the burden of proof is on the defendant to show that it related to a different demand from the one in controversy. *Wilcox v. Williams*, 206.
9. **STATUTE OF LIMITATIONS—CONDITIONAL NEW PROMISE.** A promise to pay a debt when able, is not sufficient of itself as an acknowledgment or new promise to take a case out of the operation of the Statute of Limitations. *Wilcox v. Williams*, 206.
10. **STATUTE OF LIMITATIONS—ABSENCE FROM STATE.** A defendant, to avail himself of the bar of the Statute of Limitations, must have been within the State for

the full time limited by the statute after the cause of action accrued against him. *Todman v. Purdy*, 238.

11. **CONSTRUCTION OF SECTION TWO OF STATUTE OF LIMITATIONS.** Section twenty-one of the Statute of Limitations (Stats. 1867, 86) has entirely overthrown the old rule that the statute, when once it began to run, continued to run, notwithstanding absence from the State. *Todman v. Purdy*, 238.

FOREIGN CORPORATIONS CANNOT PLEAD STATUTE OF LIMITATIONS—see CORPORATIONS, 1.

MANDAMUS.

1. **MANDAMUS.** Under the Act of 1869, providing for the transfer of certain records and suits from Lander to White Pine County, (Stats. 1869, 137): *Held*, that it was the duty of the County Clerk of Lander County to transfer the records and suits therein directed to be transferred, and that he could be compelled to do so by mandamus. *Hooten v. McKinney*, 194.
2. **MANDAMUS NOT ISSUED WHEN FRUITLESS.** A mandamus will not issue to require the performance of a duty, unless it appear that the defendant has it in his power to perform the duty required. *McGuire v. Waterman*, 323.
3. **ELKO COUNTY REGISTRATION.** Where the Act to create Elko County (Stats. 1869, 158) required certain Registry Agents to register the names of electors before June 21st, 1869; and after that date a mandamus was issued to compel one of them to erase names improperly registered: *Held*, that the Registry Agent was *functus officio*; that the writ consequently could not be complied with, and that it was therefore improperly issued. *McGuire v. Waterman*, 323.

REVIEW OF ACTION OF REGISTRY AGENTS ON MANDAMUS—see REGISTRY LAW, 1, 8.

MANDAMUS FOR EQUALIZATION OF SUBSEQUENT ASSESSMENTS—see TAXES, 10.

MAXIMS.

1. **NO ADVANTAGE OF ONE'S OWN WRONG.** The law permits no person to profit by his own wrong. *Robinson v. Imperial Silver Mining Company*, 44.
2. **EXPRESSIO UNIUS EXCLUSIO ALTERIUS.** It is the presumption, when one person or thing is expressly mentioned in a statute, that all other persons and things are to be excluded. *Virginia & Truckee Railroad Company v. Elliott*, 858.

EXPRESSIO UNIUS, EXCLUSIO ALTERIUS—see CONSTRUCTION, 9.

STATUTES IN PARI MATERIA SHOULD BE CONSTRUED TOGETHER—see CONSTRUCTION, 14, 19, 20.

ALL POLITICAL POWER ORIGINATES WITH THE PEOPLE—see LEGISLATURE, 9.

MERGER.

JUDGMENT AGAINST ONE PARTNER MERGES DEBT AND BARS ACTION AGAINST CO-PARTNER—see PARTNERSHIP, 2.

MILL SITE.

LOCATION AND POSSESSION OF LAND FOR MILL SITE—see LANDS, 1, 2.

MINES.

UNAUTHORIZED LEASE BY PRESIDENT OF MINING COMPANY—see CORPORATIONS, 3.

MINING STOCKS OF DECEASED PERSONS—see EXECUTORS, &C., 9.

PAYMENT OF ASSESSMENTS ON MINING STOCK BY EXECUTORS—see PROBATE, 6.

TAXES ON PROCEEDS OF MINES—see TAXES, 1, 2.

MORTGAGE.

1. **MORTGAGE TO SECURE PURCHASE MONEY NOT A VENDOR'S LIEN.** A suit to foreclose a mortgage given to secure the purchase money of land, is not a suit for the enforcement of a vendor's lien. *Hopper v. Parkinson*, 233.

NO HOMESTEAD AS AGAINST MORTGAGE FOR PURCHASE MONEY—see HOMESTEAD, 2.

MURDER.

1. **DEGREE OF PROOF TO REBUT PRESUMPTION OF MURDER.** A charge to the jury in a murder case that, if the intentional killing is established beyond a reasonable doubt, and the proof of the killing does not manifest that the crime amounted only to manslaughter, or was justifiable or excusable homicide, the burden of proving circumstances in mitigation, justification, or excuse, would devolve upon the defendant; and that "this burden being cast upon the defendant, it is not sufficient for him to raise a reasonable doubt in the minds of the jury whether or not such circumstances exist, but it is necessary for him to establish to your satisfaction, by preponderating proof, that there are circumstances to mitigate, justify, or excuse the homicide": *Held*, error. *State v. McCluer*, 132.

MURDER—THREATS—FAILURE TO CONNECT PROOF ADMITTED ON CONDITION—see CRIMINAL LAW, 3.

NEW TRIAL.

1. **STATEMENT FOR NEW TRIAL—SPECIFICATION OF ERROR.** In a statement on motion for new trial, which contains the charge of the Judge as an entirety, a speci-

fication of error, "that the Court erred in giving to the jury the instructions as set forth in this statement," is sufficient. *Ellis v. Central Pacific Railroad Company*, 255.

2. **STATEMENT ON NEW TRIAL—SPECIFICATION OF INSUFFICIENCY OF EVIDENCE.** On motion for new trial on the ground of insufficiency of the evidence, it is indispensable in the statement to designate the particulars in which the insufficiency consists. *Caldwell v. Greely*, 258.
3. **ERRORS OF LAW TO BE POINTED OUT IN STATEMENTS.** A statement on motion for new trial on the ground of errors in law must particularly designate the errors relied on, otherwise it will be disregarded. *Caldwell v. Greely*, 258.
4. **FATAL DEFECTS IN STATEMENTS ON NEW TRIAL.** If a statement on motion for new trial, on the grounds of insufficiency of evidence and errors in law, fail to specify the particulars in which the evidence is insufficient, and the particular errors in law relied on, an order denying such motion will not be disturbed in the Appellate Court, nor will any inquiry be made into the merits of the motion. *Caldwell v. Greely*, 258.
5. **NEW TRIAL—SPECIFICATION OF "ERRORS IN LAW."** Where a motion for new trial was made upon the sole ground of "errors in law occurring at the trial," and the statement contained no specification of the particular errors relied on: *Held*, that the granting of a new trial was error. *Mc Williams v. Herschman*, 263.
6. **DEFECTIVE STATEMENTS ON NEW TRIAL.** A statement on motion for new trial on the sole ground of errors in law, which contains no specification of particular errors, as required by section one hundred and ninety-seven of the Practice Act, is virtually no statement; and a Court has no more right to grant a new trial on such a statement than if there were no statement at all. *Mc Williams v. Herschman*, 263.
7. **DISTINCTION AS TO WEIGHT OF EVIDENCE ON NEW TRIAL AND ON APPEAL.** The rule that a verdict should not be reversed as against evidence by an Appellate Court, where there is a material conflict in the testimony, and there is some substantial evidence to support it, does not apply with strictness to motions for new trial; and it is generally held that on such motions, to authorize the *nisi prius* Judge to set aside a verdict, the weight of evidence against the verdict need not be so decided and great as is required by an Appellate Court to reverse it. *State v. Yellow Jacket Company*, 415.

AMENDMENTS TO STATEMENTS ON NEW TRIAL—see **AMENDMENTS**, 1.

JUDGMENT CLEARLY RIGHT SHOULD NOT BE SET ASIDE FOR ERROR—see **APPEALS**, 3.

APPEAL FROM PROCEEDINGS SUBSEQUENT TO ARGUMENT OF MOTION FOR NEW TRIAL—see **APPEALS**, 12.

APPEAL FROM ORDER REFUSING AMENDMENT TO STATEMENT ON NEW TRIAL—see **APPEALS**, 13.

POINTS INVOLVED ON APPEAL FROM NEW TRIAL ORDER—see APPEALS, 14.

NEW TRIAL IN CRIMINAL CASES WHERE JURY MISLED BY CHARGE—see CHARGE, 2.

REDUCTION OF VERDICT ON NEW TRIAL—see VERDICT, 1.

NOTICE.

1. **APPROPRIATION OF RIGHT OF WAY, NOT AN APPROPRIATION OF A TRACT OF LAND.** A notice of appropriation of a right of way for a water ditch is not sufficient as a notice of appropriation of the land upon the sides of it. *Robinson v. Imperial Silver Mining Company*, 44.

NOTICE OF OTHER INSURANCE—see INSURANCE, 1.

NOTICE OF INTENTION TO INSURE NOT NOTICE OF INSURANCE—see INSURANCE, 3.

NOTICE OF INTENTION TO RENEW INSURANCE NOT NOTICE OF RENEWAL—see INSURANCE, 6.

NOTICE TO QUIT UNDER VOID LEASE—see LANDLORD AND TENANT, 1.

OFFICES AND OFFICERS.

1. **APPOINTMENTS TO NEW COUNTY OFFICES OR VACANCIES.** The Constitutional provision requiring county and township officers to be elected by the people, (Art. IV, Sec. 32) does not apply to cases of emergency or special occasion, such as the creation of a new office or a vacancy. *Clarke v. Irwin*, 111.
2. **APPOINTMENT BY BOTH LEGISLATURE AND GOVERNOR.** By the White Pine County Act (Stats. 1869, 108) Irwin was appointed Sheriff of that county, and the Governor granted him a commission as such: *Held*, whether the appointing power resided in the Legislature or in the Governor, Irwin was lawfully such Sheriff. *Clarke v. Irwin*, 111.
3. **APPOINTMENT TO TAKE EFFECT AT FUTURE DAY.** An appointment to a new office to take effect at a future day, when the act creating such office is to go into effect, is a good appointment. *Clarke v. Irwin*, 111.
4. **OFFICIAL SERVICES UNDER UNCONSTITUTIONAL STATUTES.** Where an officer performed services under an unconstitutional Act: *Held*, that such services were gratuitous and no compensation could be recovered therefor, on the principle that the right to the salary or compensation of an office depends upon the title to such office. *Meagher v. County of Storey*, 244.
5. **INDIRECT TRIAL OF RIGHT TO OFFICE.** In an action by a City Recorder for fees for services performed under an Act claimed to be void: *Held*, that the constitutionality of the Act could be inquired into, though it might be indirectly trying plaintiff's right to the office. *Meagher v. County of Storey*, 244.

6. **VALIDITY OF ACTS OF DE FACTO OFFICERS.** Acts performed by a City Recorder as a Committing Magistrate, though the statute authorizing him to so act is unconstitutional and void, are to be regarded as acts of a *de facto* officer, and valid as to third persons and the public. *Meagher v. County of Storey*, 244.
7. **DE FACTO OFFICERS CANNOT RECOVER FOR SERVICES.** The considerations which support and validate the acts of officers *de facto* do not go so far as to authorize the recovery by them of payment for services performed as such. *Meagher v. County of Storey*, 244.
8. **OFFICE, HOW VACATED.** An office presently filled cannot become vacant without a removal either voluntary or involuntary; when voluntary, no judicial determination resulting in vacation is necessary; when involuntary, such determination is essential, unless otherwise provided by the Constitution or laws in pursuance thereof. *O'Neale v. McClinton*, 829.

REMOVAL OF JUDGES FROM OFFICE—see CONSTITUTION, 15.

OFFICIAL ACTS BY EMPLOYEES—see CONSTRUCTION, 7.

STATUTES RELATING TO DIFFERENT OFFICERS HAVING SIMILAR DUTIES—see CONSTRUCTION, 20.

DUTY OF OFFICER TO MAKE RETURN TO WRIT OF HABEAS CORPUS—see HABEAS CORPUS, 2.

INSANITY OF DISTRICT JUDGE DOES NOT VACATE OFFICE—see INSANE PERSONS, 1.

CONSTITUTION RECOGNIZES NECESSARY LEGISLATIVE OFFICERS—see LEGISLATURE, 2.

VACANCY IN NEW OFFICE—see VACANCY, 2.

ORDER.

LOSS OF RECORDS—NEGLECT OF CLERKS TO ENTER ORDERS—see RECORD, 1.

ORDER FOR PUBLICATION OF SUMMONS—see SUMMONS, 1, 2.

ORMSBY COUNTY

1. **ORMSBY COUNTY RAILROAD BONDS.** The Act authorizing the issuance of the bonds of Ormsby County to the Virginia and Truckee Railroad Company (Stats. 1869, 48) is not unconstitutional. *Gibson v. Mason*, 288.

PARDON.

AMNESTY A GENERAL PARDON—see AMNESTY, 1.

POWER OF PRESIDENT OF UNITED STATES TO PARDON—see UNITED STATES, 2.

PARTNERSHIP.

1. **PARTNERSHIP CONTRACTS JOINT.** Partnership obligations are joint in their nature at least to the extent that one partner may always take advantage of the non-joinder of his copartner in an action on a partnership contract. *Tinkum v. O'Neale*, 98.
2. **JUDGMENT AGAINST ONE PARTNER BARS ACTION AGAINST HIS COPARTNER.** A judgment against one partner upon a partnership contract merges the debt and constitutes a bar to a subsequent action for the same breach against his copartners. *Tinkum v. O'Neale*, 98.
3. **ACTION AGAINST PARTNER WHERE COPARTNER DISCHARGED IN BANKRUPTCY.** Where one of two partners is discharged in bankruptcy, the other may be proceeded against alone. *Tinkum v. O'Neale*, 98.

PARTY.

EXECUTORS COMPETENT WITNESSES IN THEIR OWN BEHALF—see **WITNESS**, 1.

PATENT.

REMOVAL OF WOOD CUT ON PUBLIC LAND BEFORE PATENT—see **LANDS**, 5.

PLEADING.

1. **FACTS NOT REQUIRING PROOF REQUIRE NO PLEADING.** No fact is required to be pleaded which it is unnecessary to prove. *Todman v. Purdy*, 238.
2. **PLEADING ON INSURANCE POLICY.** If, in an action on an insurance policy, the claimant alleges generally a compliance with its terms and verifies his pleading, he will not be put to proof unless in the answer particular breach is averred. *Healey v. Imperial Fire Insurance Company*, 268.

PLEADING AND PROOF OF OWNERSHIP OF PROMISSORY NOTES—see **PROMISSORY NOTES**, 4.

POSSESSION.

1. **ACTUAL POSSESSION OF LAND—WHAT.** The possession of public land necessary to be shown to enable a claimant relying solely upon prior possession to recover in ejectment, must be an actual occupation—a complete subjugation to the will and control, a *pedis possessio*. The mere assertion of title, the casual or occasional doing of some acts on the land, or the bare marking of boundaries, have never been held sufficient after the lapse of a sufficient time to make

such inclosures or improvements as may be necessary to give actual possession. *Robinson v. Imperial Silver Mining Company*, 44.

LOCATION AND POSSESSION OF LAND FOR MILL SITE AND WATER RIGHT—see LANDS, 1, 2.

TOWN SITE APPROPRIATION AND POSSESSION—see LANDS, 3.

FORCIBLE INTERRUPTION OF SETTLEMENT ON PUBLIC LAND—see LANDS, 4.

LOSS OF LIEN FOR KEEPING ANIMALS BY SURRENDER OF POSSESSION—see LIENS, 1.

RIGHT OF PRESENT POSSESSION TO MAINTAIN REPLEVIN—see REPLEVIN, 1.

RIGHT OF PROPERTY ON CONDITIONAL SALE OF CHATTELS—see SALES, 1, 2.

PRESUMPTION IN FAVOR OF POSSESSION OF SETTLER FORCIBLY DRIVEN OFF—see SETTLERS, 1.

PRACTICE

1. ADHERENCE TO LAW ON POINTS OF PRACTICE. Though a source of regret to a Court to decide a point of practice so as to affect substantial rights, such point when presented must be met, and the only safe and proper rule is to adhere to the law. *Imperial Silver Mining Company v. Barstow*, 252.
2. ADHERENCE TO ESTABLISHED RULES OF PRACTICE. It is better to follow a wrong rule in matters of practice, which has been established and generally adopted and acted on, than to adopt a new rule to which, at some future time, equally serious objections may present themselves. *Sherwood v. Sisa*, 349.

SERVICE OF SUMMONS IN COUNTY WHERE BEFORE SERVED OUT OF COUNTY—see SERVICE, 2.

PRACTICE ACT.

1. CONSTRUCTION OF SECTION THIRTY-TWO OF PRACTICE ACT. Section thirty-two of the Practice Act does not provide a rule for the disposition of actions against several joint debtors, where all have been served and appeared, and the proceedings against one are suspended by bankruptcy. *Tinkum v. O'Neale*, 93.
2. CONSTRUCTION OF SECTION THREE HUNDRED AND ELEVEN OF PRACTICE ACT. Section three hundred and eleven of the Practice Act does not conflict with Section four hundred and forty-one of the same, which allows costs to the contestants of an executor's accounts as the prevailing parties, when they succeed in reducing the amounts allowed on settlement. *Estate of Millenovich*, 161.
3. PRACTICE ACT, SECTIONS ONE HUNDRED AND EIGHTY-TWO AND THREE HUNDRED AND FORTY—"WRITTEN DECISION" AND "WRITTEN OPINION." The "written decision" referred to in section one hundred and eighty-two of the Practice

Act, is something which must precede the judgment, and upon which it is entered, and is different from the "written opinion" referred to in section three hundred and forty. *Corbett v. Job*, 201.

PRACTICE ACT, SEC. 82—JUDGMENT AGAINST JOINT DEBTORS—see JOINT DEBTORS, 2.

PRACTICE ACT, SEC. 197—DEFECTIVE STATEMENTS ON NEW TRIAL—see NEW TRIAL, 6.

PROVISIONS FOR OTHER THAN PERSONAL SERVICE—see SERVICE, 1.

PRACTICE ACT, SECS. 28 AND 33—SECOND SERVICE OF SUMMONS—see SUMMONS, 8.

PRESUMPTIONS.

PRESUMPTIONS OF CORRECTNESS OF INSTRUCTIONS GIVEN AND REFUSED—see APPEALS, 18, 19.

PRESUMPTION OF CONSTITUTIONALITY OF STATUTES—see CONSTRUCTION, 1, 11.

PRESUMPTION AS TO RATIFICATION OF LEASE—see CORPORATIONS, 8.

PRESUMPTION IN FAVOR OF PROCEEDINGS OF UNITED STATES DISTRICT COURTS—see JURISDICTION, 2.

NO PRESUMPTION IN FAVOR OF JURISDICTION OF JUSTICE OF THE PEACE—see JUSTICE OF THE PEACE, 1.

PRESUMPTION OF OWNERSHIP IN HOLDER OF PROMISSORY NOTE—see PROMISSORY NOTES, 8.

PRESUMPTION IN FAVOR OF SETTLER INTERRUPTED IN SETTLEMENT—see SETTLERS, 1.

PRESUMPTIONS IN FAVOR OF STATUTES—see STATUTES, 8.

PROBATE.

1. POSITIVE LAW MUST BE STRICTLY FOLLOWED BY EXECUTORS. When the law has clearly pointed out a certain course to be pursued by executors, that course must be strictly followed; and if they disregard it they should be held to answer for any loss which the estate may suffer thereby, notwithstanding they may have been actuated by the best of motives. *Estate of Millenovich*, 161.
2. ACTS OF EXECUTORS IN GOOD FAITH WITHOUT ORDER OF COURT. If an executor should in good faith do an act without an order of Court, which the law declares shall not be done without such order, and if the act be one which the Court would have approved or ordered done, and no injury has resulted from his action, he should not be chargeable with mismanagement of the estate. *Estate of Millenovich*, 161.
3. SETTLEMENT OF ACCOUNTS OF EXECUTORS—IRREGULARITIES IN PROCEEDINGS. If

regularities in probate proceedings, which have not been prejudicial to the estate, should not influence the Court in the settlement of accounts, the main inquiry in such cases being whether the amounts charged are just and legal claims against the estate, and whether the executor has managed its affairs with good faith and ordinary prudence. *Estate of Millenovich*, 161.

4. **OBJECTIONS TO APPRAISERS NOT VALID OBJECTIONS TO EXECUTORS' ACCOUNTS.** That the appraisers of an estate were not disinterested parties, as by statute they are required to be, is no reason why the just accounts of the executor should not be settled and allowed. *Estate of Millenovich*, 161.
5. **PURCHASE BY EXECUTOR AFTER ESTATE CEASES TO HAVE INTEREST.** There is nothing in the probate law to prohibit an executor from becoming interested in property of the estate of his testator after the estate has ceased to have any interest in it. *Estate of Millenovich*, 161.
6. **PAYMENT OF ASSESSMENTS ON MINING STOCKS BY EXECUTORS.** It is within the jurisdiction of the Probate Court to order payment of assessments legally levied upon mining stocks belonging to the estate of a deceased person; and if the executor act in obedience to such order, it would be inequitable to charge him personally with payments so made, or refuse to allow them as just payments made for the estate. *Estate of Millenovich*, 161.
7. **ILLEGAL CLAIMS AGAINST ESTATES PARTLY PAID.** The fact that part of an illegal claim against the estate of a deceased person has been paid and allowed in a previous account of the executor, is no reason why the balance should be allowed on a subsequent account. *Estate of Millenovich*, 161.

COSTS ON CONTESTED SETTLEMENT OF EXECUTOR'S ACCOUNTS—see **COSTS**, 1.

EXECUTOR'S ACCOUNTS FOR REPAIRS, FUNERAL EXPENSES, EXPENSES OF LAST SICKNESS, &c.—see **EXECUTORS**, 3, 5, 6.

EXECUTORS INTERESTED IN PURCHASES FROM ESTATES—see **EXECUTORS, &c.**, 7.

EXPENSES OF CONTEST BETWEEN EXECUTORS—see **EXECUTORS**, 10.

INTEREST ON MONEY BORROWED BY EXECUTORS—see **EXECUTORS, &c.**, 11.

PROMISSORY NOTES.

1. **PROMISSORY NOTES OF VIRGINIA CITY.** The City of Virginia, by its Mayor and Board of Aldermen, having taken a lease of certain rooms for the accommodation of its Common Council, at a rental of two hundred dollars per month, and having agreed in the lease if the rent were not paid as it fell due, to execute its promissory notes therefor, bearing interest at five per cent. per month; and its notes having been accordingly executed in regular form; and it being admitted that it had the power to take a lease: *Held*, that it had the power to execute the notes as a means of carrying out the power of taking a lease. *Douglass v. Mayor, &c., of Virginia City*, 147.

2. **PROMISSORY NOTE PAYABLE IN CALIFORNIA OR NEVADA.** A promissory note, made in California, and payable "in California or Nevada," can at payer's option be paid in either State, and therefore cannot be construed into a contract to be performed in Nevada, so as to bring it within the purview of the rule touching the place of payment. *Wilcox v. Williams*, 206.
3. **PRESUMPTION OF OWNERSHIP IN HOLDER OF PROMISSORY NOTE.** In a suit on a promissory note by the payee, his possession thereof, though it may bear his indorsement to another person, sufficiently establishes his title to it without further proof—the law presuming the holder to be the owner. *Todman v. Purdy*, 238.
4. **PLEADING AND PROOF OF OWNERSHIP OF PROMISSORY NOTES.** In a suit by the payee on a promissory note, which appears to have been indorsed by him to a third person, the plaintiff's production thereof will raise the presumption that he is the owner without further proof; but if it should become necessary to prove a transfer back to himself he can do so without specially pleading it, any proof tending to establish his ownership, whether shown by oral evidence or indorsement on the instrument, being admissible to sustain the allegation of his being the owner and holder thereof. *Todman v. Purdy*, 238.

PUBLICATION.

1. **TIME OF PUBLICATION—"ONCE A WEEK FOR THREE WEEKS."** Where a statute for the maintenance of public schools (Stats. 1864-5, 418, Sec. 35) provided that to impose an additional school tax, an election should be called by posting notices for twenty days, and "if there is a newspaper in the county, by advertisement therein once a week for three weeks": *Held*, that it was not necessary for the call to be published twenty-one days before the day of election, but that three insertions upon three successive weeks and at any time in any of such weeks before the election, were sufficient. *State v. Yellow Jacket Company*, 415.

AFFIDAVIT FOR PUBLICATION OF SUMMONS—see **AFFIDAVIT**, 1.

ORDER FOR PUBLICATION OF SUMMONS—see **SUMMONS**, 1, 2.

RAILROADS.

1. **RAILROADS PUBLIC IMPROVEMENTS.** A railroad is a public improvement and a proper object for public aid; and the mere fact that private individuals are to own it and receive the tolls in no wise impairs or diminishes the advantages to be derived from it to the public. *Gibson v. Mason*, 283.
2. **RAILROAD USES PUBLIC USES.** It is only on the ground that railroads are public improvements that private property can be condemned for their uses; for in no case can private property be taken, even where just compensation is paid, except for public uses. *Gibson v. Mason*, 283.

3. **COUNTY BONDS FOR RAILROAD AID.** As money may be raised by taxation for aiding railroads, bonds may be issued for the same purpose to be paid by means of taxation. *Gibson v. Mason*, 288.
4. **RAILROAD CONDEMNATION OF LAND—QUANTITY.** The Railroad Act of 1865 (Stats. 1864-5, 427, Sec. 20) prescribes that State land along the line of a road may be taken for the building of depots and other necessary buildings on payment of the value thereof, provided no such piece of land taken shall exceed two acres in extent: *Held*, that this limitation of two acres does not apply to lands of individuals, and that in regard to such lands a larger quantity, if necessary, may be condemned. *Virginia & Truckee Railroad Company v. Elliott*, 358.
5. **SETTING ASIDE OF REPORT OF RAILROAD COMMISSIONERS.** The Railroad Act of 1865 (Stats. 1864-5, 427, Sec. 31) provides that, when land is taken and the Commissioners make their report, if any party be dissatisfied he may "move to set aside the report, and to have a new trial as to any tract of land, upon good cause shown therefor; and the said Court or Judge shall set aside the report as to such tract of land": *Held*, that the meaning was, not that the report should be set aside as a matter of course, because of dissatisfaction, but only on good cause shown. *Virginia & Truckee Railroad Company v. Elliott*, 358.
6. **RAILROAD DEPOTS AND BUILDINGS—HOW MUCH LAND NECESSARY.** The question as to the quantity of land which, under the Railroad Act, a company may take on the ground of its being necessary for its depots and other buildings, must be determined by the evidence produced, and depends upon many facts and circumstances for which there is no exact standard. *Virginia & Truckee Railroad Company v. Elliott*, 358.
7. **VALUATION BY COMMISSIONER OF LAND TAKEN FOR RAILROADS.** The valuation of lands taken for railroad purposes by commissioners appointed under the Railroad Act will not be disturbed, if there be any substantial testimony to support it. *Virginia & Truckee Railroad Company v. Elliott*, 358.
8. **NECESSITIES OF RAILROADS NOT TO BE CONSIDERED IN VALUING LAND TAKEN.** In awarding the compensation to be paid for land taken by a railroad company, its full actual value should be given: and in ascertaining such value everything generally, which actually enhances its present worth, should be taken into consideration, but not the fact that it is necessary or indispensable for the railroad to have it. *Virginia & Truckee Railroad Company v. Elliott*, 358.

OBJECTIONS TO PROCEEDINGS OF RAILROAD COMMISSIONERS—see APPEALS, 20.

POWER TO APPOINT RAILROAD COMMISSIONERS—see CONSTITUTION, 16.

LEGISLATIVE POWER AS TO AIDING RAILROADS—see LEGISLATURE, 12.

ORMSBY COUNTY RAILROAD BOND ACT CONSTITUTIONAL—see ORMSBY COUNTY, 1.

DEMAND FOR SWORN STATEMENTS OF RAILROAD COMPANIES—see **SWORN STATEMENTS**, 1.

SWORN STATEMENTS OF RAILROAD COMPANIES—see **TAXES**, 6, 7.

RATIFICATION.

RATIFICATION OF AGENTS' UNAUTHORIZED ACTS—see **AGENCY**, 1, 2, 3, 4.

RATIFICATION OF LEASE BY PRESIDENT OF MINING COMPANY—see **CORPORATIONS**, 3, 4.

RECORD.

1. **LOSS OF RECORDS—NEGLECT OF CLERKS TO ENTER ORDERS.** Where, on a contested settlement of the accounts of an executor, he claimed that he had paid certain assessments on mining stocks under an order of the Probate Court directing him to do so, and the order did not appear to have been entered on the minute book of the Court, and could not be found among the papers on file, but the attorney for the executor testified that it had been duly made, and that he had seen it among the papers of the Court after the contest had arisen, and that no assessments were paid until after the making of the order: *Held*, that the neglect of the clerk to enter the order, or its loss, could in no way affect the rights of the executor, nor render the order less effective as a protection to him. *Estate of Millenovich*, 161.

RECORD ON APPEAL FROM NEW TRIAL ORDER—see **APPEALS**, 11.

ERRORS OF TRANSCRIPTION IN RECORD ON APPEALS—see **APPEALS**, 16.

RECORD OF BOARD, OF BOARD OF EQUALIZATION—see **BOARD OF EQUALIZATION**, 1.

SECONDARY PROOF OF LOST JUDICIAL RECORDS—see **EVIDENCE**, 6.

TRANSFER OF RECORDS FROM LANDER TO WHITE PINE COUNTY—see **MANDAMUS**, 1.

RECORDER.

1. **FILING PAPERS IN RECORDER'S OFFICE—INDORSEMENT OF FILING.** Where a statute (Utah Stats. 1855, 176) required a copy of a survey to be filed in the County Recorder's office, and a copy was produced therefrom with an indorsement by the Recorder that it was filed at the proper time, the fact that there was a further indorsement by him that it was recorded, which was not required: *Held*, not to vitiate the filing as required by law nor admit a presumption that it was merely filed for record. *Robinson v. Imperial Silver Mining Company*, 44.
2. **CONSTRUCTION OF STATUTES—"RECORDERS."** The Act of 1861, (Stats. 1861, 422) authorizing "Recorders" within their respective counties to take acknowledg-

ments, referred to County Recorders, and not to Judicial Recorders—officers not then known to the laws. *Ford v. Hoover*, 141.

ACKNOWLEDGMENTS BY COUNTY RECORDERS—see ACKNOWLEDGMENTS, 1, 2.

RECORDER OF CITY.

1. **POWERS OF COMMITTING MAGISTRATES JUDICIAL.** The power sought to be conferred upon City and Town Recorders, by section thirty-eight of the Act concerning Courts of Justice, (Stats. 1864-5, 116) to "exercise the duties of Committing Magistrates," etc., is completely judicial in its character. *Meagher v. County of Storey*, 244.
2. **CITY RECORDERS CANNOT BE MADE COMMITTING MAGISTRATES.** Section thirty-eight of the Act concerning Courts of Justice, (Stats. 1864-5, 116) in so far as it authorizes City and Town Recorders "to possess the powers and exercise the duties of Committing Magistrates," etc., is unconstitutional and void. *Meagher v. County of Storey*, 244.

REGISTRY LAW.

1. **MANDAMUS—REVIEW OF ACTION OF REGISTRY AGENTS.** Under sections six and eight of the Registry Law, (Stats. 1869, 140) the functions of the writ of mandamus are enlarged so as to allow a hearing of evidence, and an enforcement by such writ of the proper registration of an elector, or the erasure of a name improperly registered: being in effect a review of judicial or discretionary action of the Registry Agent. *McGuire v. Waterman*, 323.
2. **RIGHT TO VOTE—REGISTRY—LAW OATH UNCONSTITUTIONAL.** The registry law (Stats. 1864-5, 382) provided that no person should be entitled to have his name registered—and consequently to vote—until he had taken an oath that he had not, after arriving at eighteen years of age, been voluntarily engaged in rebellion against the government; while the Constitution (Art. II, Sec. 1) provides that no such person should be allowed to vote unless an amnesty be granted: *Held*, on an application for registry by one who could not take the prescribed oath, but was entitled under the Constitution to the right of suffrage, that the oath required by the registry law was unconstitutional, and that as the registry agents could not alter or modify it so as to leave out the objectionable part, the entire oath must fall. *Davies v. McKeeby*, 369.
3. **REGISTRY OF PERSONS ENTITLED TO VOTE—MANDAMUS.** The Registry Agent appointed under the registry law (Stats. 1864-5, 382) may be compelled by mandamus to register the names of all persons applying and entitled under the Constitution to vote. *Davies v. McKeeby*, 369.

ELKO COUNTY REGISTRATION—WHEN REGISTRY AGENT FUNCTUS OFFICIO—see MANDAMUS, 3.

REPAIRS.

CHARGES FOR REPAIRS MADE BY EXECUTORS—see EXECUTORS, &c., 3.

REPAIRS OF ROADS AND BRIDGES—see ROADS AND BRIDGES, 1.

REPEAL.

REPEAL OF STATUTE GIVING VESTED RIGHTS—see CONSTRUCTION, 8.

REPLEVIN.

1. RIGHT OF PRESENT POSSESSION TO MAINTAIN REPLEVIN. In an action for the recovery of specific personal property, it is necessary for the plaintiff to show that he is entitled to the immediate possession. *Hilger v. Edwards*, 85.

REPORTS.

SETTING ASIDE REPORTS OF RAILROAD COMMISSIONERS—see RAILROADS, 5.

RIGHT OF WAY.

APPROPRIATION OF RIGHT OF WAY NOT AN APPROPRIATION OF TRACT OF LAND—see NOTICE, 1.

ROADS AND BRIDGES.

1. CONSTRUCTION AND REPAIR OF ROADS AND BRIDGES—POWERS OF COUNTY COMMISSIONERS AND AUDITOR. Under the Act of 1865, relating to the apportionment of county revenues, (Stats. 1864–5, 376) it is within the power of County Commissioners to authorize the payment of indebtedness incurred in the construction or repair of public roads and bridges, out of the "General Fund," and that of the County Auditor to draw warrants thereon for such indebtedness *Webster v. Fish*, 190.

ROBBERY.

INDICTMENT FOR ROBBERY—OWNERSHIP OF PROPERTY—see CRIMINAL LAW, 1.

DECLARATIONS OF PARTY ROBBED AS PART OF RES GESTA—see EVIDENCE, 1, 2.

SALES.

1. RIGHT OF PROPERTY ON EXECUTORY SALE OF CHATTELS. Cardinal agreed to sell, transfer, and convey to Archambeault a team of horses as soon as cer-

- tain specified installments of price should be paid, and in the meanwhile to allow Archambeauld to have possession of and work the team until default should be made in any one of the installments; said possession, however, not to lessen or impair Cardinal's title to the property so long as any installment should remain due: *Held*, that until the installments were paid, the contract was executory, and the right of property remained in Cardinal, and could not be held as against him under an execution against Archambeauld. *Cardinal v. Edwards*, 86.
2. **RIGHT OF PROPERTY ON CONDITIONAL SALE.** A conditional sale of personal property passes no title to the vendee which can be taken by his creditors until the performance of the conditions, unless there be a waiver of the condition by an absolute and unconditional delivery of the property. *Cardinal v. Edwards*, 86.

SERVICE.

1. **STATUTORY PROVISIONS FOR OTHER THAN PERSONAL SERVICE.** Statutory provisions for acquiring jurisdiction over a defendant by any other than personal service must be strictly pursued. *Little v. Currie*, 90.
2. **SERVICE OF SUMMONS IN COUNTY WHERE BEFORE SERVED OUT OF COUNTY.** Where there were two defendants in an action, and both were served with the summons in a district different from the one in which the suit was commenced, and before the forty days allowed to answer expired, one of the defendants entered the county and was served there; and after ten days from such service, but before the expiration of the forty days, default was entered against the person so served in the county, and judgment by default rendered against defendants, to be executed against their joint property and the separate property of the defendant served in the county: *Held*, that the second service was a nullity, the default irregular, and the judgment error. *Mayenbaum v. Murphy*, 383.
3. **SECOND SERVICE OF SAME SUMMONS.** Where a summons has been served upon a defendant out of the district and afterwards served upon him in the district, with the intention of shortening the time allowed him to answer: *Held*, that the second service was an absolute nullity. *Mayenbaum v. Murphy*, 383.

SETTLERS.

1. **PRESUMPTION IN FAVOR OF SETTLER INTERRUPTED IN HIS SETTLEMENT.** In a suit for the possession of public land claimed by the plaintiff under the Utah laws, (Utah Stats. 1852, 175, and 1855, 271) where it appeared that he had entered in good faith, and had the land surveyed and was proceeding to fence it when the defendant forcibly drove him off: *Held*, that it would be presumed, even although the fence then being built was not of sufficient character, that an inclosure in all respects sufficient would have been completed. *Robinson v. Imperial Silver Mining Company*, 44.

EFFECT OF REPEAL OF STATUTES ON VESTED RIGHTS OF SETTLER—see CONSTRUCTION, 8.

POSSESSION OF SETTLER FORCIBLY DRIVEN FROM PUBLIC LAND—see LANDS, 4.

ACTUAL POSSESSION OF LAND, WHAT—see POSSESSION, 1.

STATE.

1. **RESERVED SOVEREIGN POWERS OF THE STATES.** The powers reserved by the people from the Federal Government have never been, nor are they in any instance exercised by the people at large, but by the governments of the States, which are clothed with all the sovereign authority so reserved. *Gibson v. Mason*, 283.
2. **CO-ORDINATE BRANCHES OF STATE GOVERNMENT.** Each department of the State government—legislative, executive, and judicial—is supreme within its respective sphere. *Gibson v. Mason*, 283.

STATE JURISDICTION ON HABEAS CORPUS AS TO UNITED STATES PRISONERS—see HABEAS CORPUS, 8.

LEGISLATIVE POWER OF STATE LEGISLATURE—see LEGISLATURE, 10.

ABSENCE FROM STATE—STATUTE OF LIMITATION—see LIMITATIONS, 10, 11.

STATE TELEGRAPH FRANCHISE AS AFFECTED BY CONGRESS—see TELEGRAPH, 2.

FEDERAL AND STATE POWERS—see UNITED STATES, 2.

STATEMENTS.

1. **MERE NARRATIVE OF TRIAL NOT A STATEMENT.** A paper containing a mere recital of the progress of a trial and detail of matters occurring thereat, with exceptions to the rulings of the Court taken therein, but not presenting such exceptions in the form of a bill, nor in any manner except as simply noted in the course of the narrative, is in no sense a statement, and must be disregarded. *Corbett v. Job*, 201.
2. **CERTIFICATE OF JUDGE TO STATEMENT.** If it be stated in a statement that it contains all the material evidence, the certificate of the Judge to the correctness of the statement is sufficient to establish that fact; but a certificate that a statement is correct does not show that it contains all the evidence when that fact is not stated in it. *Sherwood v. Sissa*, 349.

AMENDMENTS TO STATEMENTS ON NEW TRIAL—see AMENDMENTS, 1.

ERRORS NOT PROPERLY PRESENTED WILL NOT BE REGARDED ON APPEAL—see APPEALS, 1.

ASSIGNMENT OF ERRORS IN STATEMENT ON APPEAL—see APPEALS, 5.

MATTER PROPER IN STATEMENT ON APPEAL—see APPEALS, 6.

NO APPEAL ON FINDINGS EXCEPT BY STATEMENT—see APPEALS, 9.

STATEMENT ON APPEAL FROM PROCEEDINGS SUBSEQUENT TO ARGUMENT ON MOTION FOR NEW TRIAL—see APPEALS, 12, 13.

OBJECTIONS ON APPEAL TO STATEMENT ON NEW TRIAL—see APPEALS, 14.

STATEMENT NOT CONTAINING ALL THE EVIDENCE—see APPEALS, 17.

STATEMENT ON NEW TRIAL—SPECIFICATION OF ERROR IN CHARGE—see NEW TRIAL, 1.

STATEMENT ON NEW TRIAL—SPECIFICATION OF INSUFFICIENCY OF EVIDENCE—see NEW TRIAL, 2, 4.

SPECIFICATION OF ERRORS IN LAW IN STATEMENT FOR NEW TRIAL—see NEW TRIAL, 3, 4, 5, 6.

STATUTES.

1. "LOCAL" AND "SPECIAL" STATUTES. A "local" act is one operating over a particular locality instead of over the whole territory of the State; a "special" act is one operating upon one or a portion of a class instead of upon all of a class. *Clarke v. Irwin*, 111.
2. ACT ORGANIZING NEW COUNTY LOCAL AND SPECIAL. The White Pine County Act (Stats. 1869, 108) as it refers to only one new county and its organization, instead of to all new counties, and to those only of a class or whole, occupying or proposing to occupy such county, is a local and special act. *Clarke v. Irwin*, 111.
3. PRESUMPTIONS IN FAVOR OF STATUTES. Every statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution. *Lewis v. Doron*, 399.
4. CONSTITUTIONALITY OF ACT RELATING TO CONTROLLER. The Act of 1869, relating to the duties of the Controller, (Stats. 1869, 158) which provides for the auditing of claims by him after they shall have been passed on by the Board of Examiners, etc., neither takes anything away from the constitutional powers of the Board of Examiners, nor adds anything to those of the Controller, and is not unconstitutional. *Lewis v. Doron*, 399.

STATUTES RELATING TO ACKNOWLEDGMENTS BY COUNTY RECORDERS — see ACKNOWLEDGMENTS, 1, 2.

STATUTES RELATING TO EQUALIZATION OF ASSESSMENTS FOR TAXATION—see BOARD OF EQUALIZATION, 2.

STATUTES TAKING AWAY CONSTITUTIONAL RIGHTS IN EFFECT—see CONSTITUTION, 17.

PRESUMPTION OF CONSTITUTIONALITY OF STATUTES—see CONSTRUCTION, 1.

- POLICY AND EXPEDIENCY OF STATUTES**—see CONSTRUCTION, 3.
- STATUTE OF UTAH CONCERNING SETTLEMENTS ON PUBLIC LAND**—see CONSTRUCTION, 7, 8, 9, 10.
- REPEAL OF STATUTE GIVING VESTED RIGHTS**—see CONSTRUCTION, 8.
- STATUTES IN PARI MATERIA SHOULD BE CONSTRUED TOGETHER**—see CONSTRUCTION, 14.
- STATUTES IN PARI MATERIA, WHERE CONFLICTING**—see CONSTRUCTION, 19.
- STATUTES RELATING TO DIFFERENT OFFICERS HAVING SIMILAR DUTIES**—see CONSTRUCTION, 20.
- STATUTE RELATING TO APPORTIONMENT OF COUNTY REVENUES**—see COUNTY FUNDS, 2.
- THE LETTER OF CRIMINAL STATUTES AS OPPOSED TO THE REASON**—see CRIMINAL LAW, 7.
- LEGISLATIVE FUND ACT CONSTITUTIONAL**—see LEGISLATURE, 1.
- STATUTE AGAINST ISSUANCE OF FALSE LICENSES**—see LICENSES, 1.
- STATUTE AS TO LIENS FOR KEEPING OR BOARDING ANIMALS**—see LIENS, 1, 2.
- STATUTE OF LIMITATIONS**—see LIMITATIONS.
- OFFICIAL SERVICES UNDER UNCONSTITUTIONAL STATUTES**—see OFFICES AND OFFICERS, 4.
- ORMSBY COUNTY RAILROAD BONDS ACT**—see ORMSBY COUNTY, 1.
- PRACTICE ACT**—see PRACTICE ACT.
- STATUTE AS TO CONDEMNATION OF LAND FOR RAILROADS**—see RAILROADS, 4, 5, 6.
- REGISTRY LAW**—see REGISTRY LAW.
- LOCAL OR SPECIAL LAW FOR TAXATION**—see TAXES, 4.
- SUPPLEMENTAL REVENUE ACT OF 1867, 111**—see TAXES, 8, 9, 10.
- VIRGINIA CITY CHARTER**—see VIRGINIA CITY, 1, 2.
- CONSTITUTIONALITY OF WHITE PINE COUNTY ACT**—see WHITE PINE COUNTY, 1, 2.

SUMMONS.

1. **ORDER FOR PUBLICATION OF SUMMONS.** An order for publication of summons, which fails to state any fact upon which it is founded, is fatally defective. *Little v. Currie*, 90.
2. **ORDER FOR PUBLICATION BEFORE ISSUANCE OF SUMMONS PREMATURE.** Where an order, made by a Justice of the Peace upon the filing of an affidavit for publication of summons, directed that "summons be issued in this case as above entitled and be published, etc.": *Held*, that the direction for a summons to

issue was not the office of such an order, and that if the summons did not already exist the order was premature. *Little v. Currie*, 90.

3. **SUMMONS ONCE FULLY SERVED.** Where service of a summons has been made, and the demands of the writ satisfied, the conclusive presumption of the law is, under sections twenty-eight and thirty-three of the Practice Act, that its office, having been accomplished, no person can effectively thereafter use it for its original purpose. *Mayenbaum v. Murphy*, 383.

AFFIDAVIT FOR PUBLICATION OF SUMMONS—see **AFFIDAVIT**, 1.

SERVICE OF SUMMONS IN COUNTY, WHERE BEFORE SERVED OUT OF COUNTY—see **SERVICE**, 2, 3.

SURVEYS.

1. **SURVEY FOR SETTLEMENT UNDER UTAH STATUTE.** Under the Act of 1852, (Utah Stats. 1852, 175) requiring surveys for the purposes of settlement to be made by the County Surveyor, or survey made by persons employed by him and acting under his direction and certified by him, is sufficient. *Robinson v. Imperial Silver Mining Company*, 44.

FILING OF CERTIFICATE OF SURVEY UNDER UTAH STATUTE—see **CONSTRUCTION**, 9.

SUFFICIENCY OF CERTIFICATE OF SURVEY UNDER UTAH STATUTE—see **CONSTRUCTION**, 10.

SWORN STATEMENTS.

1. **DEMAND FOR SWORN STATEMENT—BURDEN OF PROOF.** Where a revenue Act provided that a sworn statement of the property of a railroad should be furnished on demand of the assessor, otherwise it should be deprived of the benefits of equalization; and, no proper statement being made, it was claimed by the railroad company that it did not appear that there had been any demand: *Held*, that the burden of proof was upon the railroad company desiring equalization to show the fact of neglect to make the demand. *State v. County Commissioners of Washoe County*, 317.

REFUSAL TO GIVE SWORN STATEMENT—see **BOARD OF EQUALIZATION**, 2.

SWORN STATEMENTS OF RAILROAD COMPANIES—see **TAXES**, 6.

FAILURE TO MAKE SWORN STATEMENT—see **TAXES**, 7, 8.

TAXES.

1. **NEW COUNTIES—TAXES ON PROCEEDS OF MINES.** Under the Act creating White Pine County, (Stats. 1869, 137) which took effect on April 1st, 1869, the Assessor and *ex officio* Tax Collector proceeded in April to assess the proceeds of mines in his county, and collected the tax levied on the same for the quarter ending March 31st, 1869, and preceding the organization of the new county:

Held, that the tax for that quarter was properly assessed, levied, and collected in and as of White Pine County. *County of White Pine v. Ash*, 279.

2. **FIRST-QUARTER TAXES ON PROCEEDS OF MINES.** Taxes on proceeds of mines for the first quarter of the year cannot be assessed, levied or collected, before the first Monday of April of such year; and they are to be assessed, levied, and collected by the officers of the county in which the mines are then situated, though they may have been during such quarter in another county. *County of White Pine v. Ash*, 279.
3. **COLLECTION OF TAXES BY SUMMARY PROCESS.** The power of taxation carries with it the right and power of collecting taxes by summary process. *Gibson v. Mason*, 288.
4. **LOCAL OR SPECIAL LAW OF TAXATION.** Section twenty of article four of the Constitution, so far as it forbids local or special laws "for the assessment and collection of taxes," was intended simply to inhibit local or special laws respecting or regulating the manner or mode of assessing and collecting taxes, and does not prevent the Legislature from authorizing or directing County Commissioners from levying a special tax by the passage of a local law. *Gibson v. Mason*, 288.
5. **TAXATION FOR INTEREST OF UNISSUED COUNTY BONDS.** Under the Act authorizing the issuance of the bonds of Ormsby County in aid of the Virginia and Truckee Railroad Company, (Stats. 1869, 48) the County Commissioners of that County, before the issue of the bonds, levied a tax for the purpose of meeting interest: *Held*, that the levy was not premature, any more than a levy would be for any other anticipated liability. *Gibson v. Mason*, 288.
6. **SWORN STATEMENT OF RAILROAD COMPANIES.** Under the Revenue Act of 1869, (Stats. 1869, 184) the sworn statement as to the property of railroads, to be given to assessor for assessment purposes, must show affirmatively that the person making it is one of the persons named in the statute, and be subscribed by him. *State v. County Commissioners of Washoe County*, 317.
7. **FAILURE TO MAKE SWORN STATEMENT.** The punishment prescribed for failure of a railroad company to make a sworn statement, as required by the Revenue Act of 1869, (Stats. 1869, 184, Sec. 3) is in addition to the penalty of exclusion from the benefits of equalization. *State v. County Commissioners of Washoe County*, 317.
8. **EQUALIZATION OF TAXES BY COUNTY COMMISSIONERS.** Where a Supplementary Revenue Act (Stats. 1867, 111) provided, that in cases where the County Assessor neglected to make an assessment, the County Treasurer, as *ex officio* tax receiver, should specially assess and collect the taxes; and that if any person felt aggrieved by such subsequent assessment he might apply to have it equalized by the County Commissioners, and that they should determine the matter: *Held*, that the Board of County Commissioners, while sitting to equalize such assessment, was not controlled by the restrictions imposed upon the Board of Equalization sitting under the General Revenue Act; and that it could

not, like the Board of Equalization, refuse to equalize an assessment because a sworn statement had been refused on demand of the Treasurer. *Virginia & Truckee Railroad Co. v. Commissioners of Ormsby County*, 341.

9. **SUPPLEMENTARY REVENUE ACT OF 1867.** The Supplementary Revenue Act of 1867, (Stats. 1867, 111) providing for assessments by the tax receiver, where the Assessor had made omissions, etc., was intended to authorize summary proceedings; but it gives to all persons so assessed, without conditions, a right to have their assessments equalized by the County Commissioners. *Virginia & Truckee Railroad Co. v. Commissioners of Ormsby County*, 341.
10. **DUTY OF COUNTY COMMISSIONERS TO EQUALIZE ALL "SUBSEQUENT ASSESSMENTS."** Under the Supplementary Revenue Act of 1867, providing for subsequent assessments in cases where the regular assessments by the Assessor are omitted, the right is expressly given to all persons without exception so assessed, to have their assessments equalized upon making application within the proper time to the Board of County Commissioners; and if the Board refuse to act, it may be compelled to do so by mandamus. *Virginia & Truckee Railroad Co. v. Commissioners of Ormsby County*, 341.

APPROPRIATIONS IN ANTICIPATION OF RECEIPT OF PUBLIC REVENUE—see **APPROPRIATIONS**, 1.

EQUALIZATION—REDUCTION OF ASSESSMENTS—see **BOARD OF EQUALIZATION**, 2.

LEGISLATIVE POWER OF TAXATION UNLIMITED—see **LEGISLATURE**, 13.

DEMAND FOR SWORN STATEMENT—BURDEN OF PROOF—see **SWORN STATEMENTS**, 1.

TELEGRAPH.

1. **TELEGRAPHIC COMMUNICATION—"COMMERCE."** Telegraphic communication between the States is a part of their commercial intercourse, and its regulation as commerce is within the constitutional jurisdiction of Congress. *Western Union Tel. Co. v. Atlantic & P. S. Tel. Co.*, 102.
2. **STATE TELEGRAPH FRANCHISES.** The congressional grant to all persons under certain conditions of the privilege of constructing telegraph lines, (14 U. S. Stats. at Large, 221) overrules any exclusive privilege given by any State or Territory to one. *Western Union Tel. Co. v. Atlantic & P. S. Tel. Co.*, 102.
3. **PROOF OF ACCEPTANCE UNDER CONGRESSIONAL TELEGRAPH ACT.** Where a telegraph company claims privileges under the Act of Congress of 1866, (14 U. S. Stats. at Large, 221) it is incumbent on it to show an acceptance by it of the terms prescribed in the Act, and the most proper mode of doing so is by a certified copy of the acceptance filed under the seal of the department. *Western Union Tel. Co. v. Atlantic & P. S. Tel. Co.*, 102.

TENANTS.

ENTRY UNDER VOID LEASE—TENANCY AT WILL—NOTICE TO QUIT—see **LANDLORD AND TENANT**, 1.

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chase of land in the name of another, the consideration must be shown to have been advanced at the time the title was acquired; as the trust must be created at the very time the title passes, and no subsequent transaction being allowed to impress the character of a trust estate upon that which was absolute in the purchaser at the time it was acquired. *Frederick v. Haas*, 389.

3. **RESULTING TRUST—ADVANCE OF CONSIDERATION IN CHATTELS.** Where Wolfe and Frederick agreed with Stowe to purchase land of him for five hundred dollars, each to have an undivided half, and Wolfe accepted from the agent of Frederick at the time a watch in lieu of one hundred and seventy-five dollars of the purchase money, and other chattels for the purpose of selling them and making up the balance of two hundred and fifty dollars, and took the deed of the land in his own name, canceled a debt due him by Stowe in payment thereof, and sold the chattels and made up the balance: *Held*, that there was a resulting trust for one-half the land in Wolfe in favor of Frederick. *Frederick v. Haas*, 389.
4. **EVIDENCE TO SHOW RESULTING TRUST.** To establish a resulting trust in favor of one furnishing the consideration for land purchased in the name of another, it is enough for the *cestui que trust* to show an agreement on the part of the trustee to purchase, and that the consideration was furnished to him before he acquired the title. *Frederick v. Haas*, 389.

UNITED STATES.

1. **POWER OF CONGRESS AS TO TELEGRAPH LINES.** The Act of Congress of 1866, in aid of telegraph lines, etc., (14 U. S. Stats. at Large, 221) in so far as it prescribes privileges, conditions, etc., is an Act regulating commerce and supersedes State legislation. *Western Union Tel. Co. v. Atlantic & P. S. Tel. Co.*, 102.
2. **FEDERAL AND STATE POWERS.** The Federal Government was organized by the concession to it of such certain specified powers as were deemed necessary to secure and promote the general welfare of all the States, the residuum being retained by the people; and these reserved powers are supreme and absolute over life, liberty, and property, except as restrained or limited by their own concessions through the Federal Constitution. *Gibson v. Mason*, 283.
3. **POWER OF PRESIDENT OF UNITED STATES TO PROCLAIM AMNESTY.** The Constitutional power of the President of the United States to pardon includes the right to proclaim an amnesty. *Davies v. McKeeby*, 369.

STATE COURTS TAKE JUDICIAL NOTICE OF LAWS OF UNITED STATES—see EVIDENCE, 5.

STATE JURISDICTION ON HABEAS CORPUS AS TO UNITED STATES PRISONERS—see HABEAS CORPUS, 3.

STATE COURTS NOT TO INTERFERE WITH JURISDICTION OF UNITED STATES COURTS—see JURISDICTION, 1.

PRESUMPTIONS IN FAVOR OF PROCEEDINGS OF UNITED STATES DISTRICT COURTS
—see **JURISDICTION**, 2.

VACANCY.

1. **POWER OF GOVERNOR TO APPOINT TO VACANCY.** Before the Governor can exercise the appointing power of filling a vacancy (Const., Art. V, Sec. 8) two things must concur; there must be a vacancy, and no provision made by the Constitution or any existent law for filling the same. *Clarke v. Irwin*, 111.
2. **"VACANCY" IN NEW OFFICE.** Where a new office is created and no person appointed to fill it, there is a vacancy. *Clarke v. Irwin*, 111.
3. **INSANITY OF DISTRICT JUDGE.** Where a District Judge was pronounced insane and sent to an insane asylum under the provisions of the statute for the care of insane persons, (Stats. 1869, 104) and upon a certificate thereof, the Governor appointed another person to fill his office as in case of a vacancy: *Held*, that the office was not vacant, and that the appointment of another Judge was void. *O'Neale v. McClinton*, 329.

LEGISLATIVE POWER TO DECLARE WHAT SHALL OPERATE "VACANCY"—see **LEGISLATURE**, 7.

APPOINTMENTS TO VACANCIES—see **OFFICES AND OFFICERS**, 1.

OFFICE, HOW VACATED—see **OFFICES AND OFFICERS**, 8.

VENDOR'S LIEN.

NO HOMESTEAD AS AGAINST VENDOR'S LIEN FOR PURCHASE MONEY—see **HOMESTEAD**, 1.

MORTGAGE TO SECURE PURCHASE MONEY NOT A VENDOR'S LIEN—see **MORTGAGE**, 1.

VENUE.

1. **CHANGE OF VENUE, WHAT.** To change the venue in a case is to direct the trial to be had in a different county from that where the venue is laid; but if a new county be created out of a portion of an old one, an Act directing suits relating to property in the new one to be tried in the new county is not an Act changing the venue of such suits. *Hooten v. McKinney*, 194.

TRANSFER OF RECORDS FROM LANDER TO WHITE PINE COUNTY—see **WHITE PINE COUNTY**, 2.

VERDICT.

1. **PROVINCE OF JUDGE AND JURY—REDUCTION OF VERDICT BY JUDGE.** In an action on an injunction bond the Judge instructed the jury to consider certain items of alleged damage, which should not have been considered; and

in deciding a motion for a new trial, endeavored to correct the error by reducing the verdict and confining it to the amounts claimed upon the counts by him considered good: *Held*, that this was assuming the province of the jury, and could not be done. *Brown v. Jones*, 374.

2. **WHEN A VERDICT WILL BE REVERSED AS AGAINST EVIDENCE.** To justify an Appellate Court in reversing the verdict of a jury on the ground that it is against evidence, there must be a preponderance of evidence against it so great as to satisfy the Court that there was either an absolute mistake on the part of the jury, or that they acted under the influence of prejudice, passion, or corruption. *State v. Yellow Jacket Company*, 415.

VERDICT CLEARLY RIGHT SHOULD NOT BE SET ASIDE FOR ERROR—see APPEALS, 3.

WHEN A VERDICT WILL BE REVERSED AS AGAINST EVIDENCE—see APPEALS, 21.

FINDINGS EQUIVALENT TO VERDICT—see FINDINGS, 2.

VIRGINIA CITY.

1. **CONSTRUCTION OF CHARTER OF VIRGINIA CITY—CONTINGENT FUND.** The Charter of Virginia City (Stats. 1864, 55; Sec. 23, Sub. 18) provides, that "the Common Council shall not authorize the issuance of, nor shall any city officer issue, any scrip or other evidence of debt or order on the Contingent Fund, unless there be actually cash in the treasury to meet the order or warrant so drawn": *Held*, that the restriction here imposed applied solely to the Contingent Fund, and did not prevent the city from issuing, in proper cases, its promissory notes or other evidences of indebtedness drawn on the General Fund, without regard to cash in the treasury. *Douglass v. Mayor, &c., of Virginia City*, 147.
2. **INTEREST ON INDEBTEDNESS OF VIRGINIA CITY.** The fact that a provision of the charter of Virginia City (Stats. 1864, 55, Sec. 23, Sub. 21) limits the interest to be paid on certain bonds therein authorized to be issued to twelve per cent., does not by implication deny the right to pay a higher rate of interest upon any other character of indebtedness, but, on the contrary, by limiting the rate to be paid on one peculiar kind of paper admits the presumption that upon all other kinds no limitation was intended. *Douglass v. Mayor, &c., of Virginia City*, 147.

WAIVER.

1. **WAIVER OF ERRORS TO BE SHOWN BY PARTY CLAIMING WAIVER.** It is incumbent upon a party who wishes to avoid the consequence of error in legal proceedings upon the ground of waiver by the opposite party, to show such waiver—not upon the party insisting on the error to establish that he did not waive it. *McWilliams v. Herschman*, 263.

ADMISSION OF COUNSEL IN ARGUMENT—see ATTORNEYS, 1.

WAIVER OF RIGHT OF LIEN—see LIENS, 1, 2.

WAIVER OF CONDITION ON CONDITIONAL SALE—see SALES, 2.

WARRANTS.

COUNTY WARRANTS ISSUED NOT AFFECTED BY SUBSEQUENT INJUNCTION—see AUDITOR, 1.

ISSUANCE OF COUNTY WARRANTS DRAWN ON DISTINCT FUNDS—see COUNTY FUNDS, 1.

INTEREST ON CONTROLLER'S WARRANTS UNDER LEGISLATIVE FUND ACT—see INTEREST, 1.

WATER RIGHTS.

A DEED OF A WATER RIGHT DOES NOT CONVEY A MILL SITE—see DEEDS, 1.

DIFFERENCE BETWEEN APPROPRIATIONS OF LAND AND WATER—see LANDS, 2.

WATER RIGHTS—NO RIPARIAN PROPRIETORSHIP ON PUBLIC LAND—see LANDS, 6.

APPROPRIATION OF RIGHT FOR WATER DITCH NOT AN APPROPRIATION OF TRACT OF LAND—see NOTICE, 1.

WHITE PINE COUNTY.

1. CONSTITUTIONALITY OF WHITE PINE COUNTY ACT. The Act creating the County of White Pine and providing for its organization (Stats. 1869, 108) is not in conflict with sections twenty, twenty-one, or thirty-two, of article four of the Constitution. *Clarke v. Irwin*, 111.
2. TRANSFER OF RECORDS FROM LANDER TO WHITE PINE COUNTY. Where the County of White Pine was created out of a portion of the County of Lander, and certain records and suits relating to property in the new county were directed by legislative act to be transferred from the county seat of Lander County to the county seat of White Pine County, and to be tried in the District Court of the Eighth instead of the Sixth Judicial District: *Held*, that such Act was not an Act changing venue within the meaning of the constitutional prohibition of a legislative change of venue. *Hooten v. McKinney*, 194.

TAXES ON PROCEEDS OF MINES IN WHITE PINE COUNTY—see TAXES, 1.

WITNESS.

1. EXECUTORS COMPETENT WITNESSES ON THEIR OWN BEHALF. An executor is not within the exception of the Act excluding persons as witnesses on their own behalf, where the opposite party is the representative of a deceased person, etc. (Stats. 1864-5, 77.) *Estate of Millenovich*, 161.

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